THE CENTRAL LAW JOURNAL

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, JANUARY 15, 1875. { Hon. JOHN F DILLON, Contributing Editor.

PUBLICATION OF LEGAL NOTICES.—The Albany Law Journal does not seem quite satisfied with the propriety of the measure recently approved by Governor Dix, which requires all legal advertisements to be inserted in a law journal to be designated by the judges. If Governor Dix's course, in approving the bill, needs any vindication, it will be found in his own language in a private letter written in regard to the matter on the 5th of December. He uses the following language, the Italics being ours:

> I am aware that the judges are unanimous, and the bar nearly so, in favor of the bill, and that the publication of legal notices provided for by this bill is very desirable. Wherever more than one notice or advertisement in any legal proceeding is required, one would be published in the daily law journal which the judges named in the bill should designate. If only one notice or advertisement is required, it would be published in the designated journal. *There is no doubt that such a publication would put an end to the gross frauds which are not unfrequently perpetrated by giving legal notices and advertisements to obscure papers for the purpose of concealing them from the parties interested. By having one journal in which every such notice or advertisement would appear, parties to legal proceedings would always know where to look for it. The cases are numerous in which such publication is required to be made in three or four newspapers, and it is right that one notice or advertisement should be made where it can always with certainty be found.*

DEPOSITIONS BEFORE NOTARIES—WITNESS REFUSING TO TESTIFY ON THE GROUND THAT THERE IS NO "SUIT PENDING."—We publish elsewhere an interesting opinion of Mr. Justice Lewis, of the Supreme Court of Missouri, in *ex parte* Munford, expounding the statute of Missouri, which provides for the taking of depositions to be used conditionally in "suits pending." As the statutes of several other states have provisions similar to that of Missouri, the case has more than a local interest. The petitioner, being summoned before a notary public, before whom a deposition in a certain suit was being taken, refused to testify, on the ground that there was no suit pending, and was by the notary committed to jail. It appeared that a demurrer had been interposed to the petition in the suit and sustained; that the plaintiff had been allowed thirty days in which to amend, and that at the time the witness was summoned before the notary, the amended petition had not been filed; and it was hence urged that as there was no valid petition in court, there was no suit "pending," within the meaning of the statute, which provides that "any party to a *suit pending* in any court in this state, may obtain the deposition of any witness to be used in such suit conditionally." 1 Wagn. Stat. 522, § 1. But the learned judge ruled otherwise, and the witness was remanded to jail. He quotes in support of this view, Brown v. Foss, 16 Maine, 257, in which a similar statute received a similar exposition in a still stronger case.

SALVAGE TO THE OWNER OF A DISTRESSED VESSEL.—In the Pacific Mail Steamship Company v. Ten Bales of Gunny Bags, United States District Court, District of California, Hoffman, J. [8 Pac. L. R., 155.], the Pacific Mail Steamship Company's steamship Colima, broke her propeller at sea, by reason of a latent defect which could not have been detected by any tests known to mechanics, and was towed into port by another vessel belonging to the same company. Having done this, the company filed a libel for salvage against a part of the cargo of the Colima. The bills of lading contained a provision that the vessel should not be liable "for *accidents*, loss and damage from *machinery*, boilers and steam, or from accidents or perils of the seas, or of land and rivers, or of *sail or steam navigation*, of whatever kind or nature soever." It was held on the authority of the Miranda, 3 L. R. Adm. 561, 1. That, although these stipulations would not avail to exonerate the carrier from liability for damages caused by his actual negligence; yet they must exempt him from liability for the consequences of a secret defect which no diligence could discover or guard against, and where the previous history of the vessel afforded the strongest grounds for the belief that such defects could not exist.

2. That the libellants being thus found not to be liable as carriers for the consequences of the accidents to the machinery they are entitled to claim as salvors a reasonable compensation for their service to the cargo.

We cannot perceive upon what sound principles this case can be supported. It cannot be possible that a carrier is entitled to additional compensation for doing no more than what it was his duty under his contract to do. To say that because he would not have been liable for any losses happening from the breaking of the propeller, through a latent defect, he is therefore entitled to salvage for saving the goods, is a *non sequitur;* because it omits to take into consideration the fact that after the accident occurred, the carrier was still under obligations to save the goods if he could, without incurring extraordinary risk in order to do so. According to the facts, as detailed by Mr. District Judge Hoffman, the ship performing the salvage incurred thereby no extraordinary peril. The Pacific Mail Steamship Company, therefore, did no more than their duty under their contract, and hence were not entitled to compensation. The proposition of the learned judge might be reversed, and it might well be said that if the agents and servants of the company had *negligently* suffered the Colima to become a wreck after the breaking of her propeller, her owners would have been liable as carriers; and since they would have been liable as carriers, they are not entitled to salvage. Independently of these considerations, strong reasons of public policy appear to point to the conclusion that a carrier ought not to be entitled to salvage in any case for saving goods imperiled in one of his own vessels.

Judge Benedict's Case.

We have heretofore (1 CENT. L. J 591) apprised our readers of the nature of a suit which had been brought by Edward Lange, against Mr. District Judge Benedict, of the Eastern District of New York, for false imprisonment. It will not, therefore, again be necessary for us to repeat the facts of the case; but we recur to it, at this time, for the purpose of noting the fact that Judge Van Brunt of the state court, has overruled the demurrer to the petition, thus holding that an action will lie in one of the state courts against a judge of a federal court, for sentencing a person to imprisonment with-

out jurisdiction. In overruling the demurrer, Judge Van Brunt delivered a written opinion, in which, according to a New York paper, he says, in answer to the contention, that the second sentence was lawful, he deems it indecorous to attempt to review a decision of the highest judicial tribunal in the land (*ex parte* Lange, 18 Wall. 163), and thereupon—assuming the second sentence to be without authority—he discusses the other questions raised on the demurrer. "There is no principle," he says, "which is better settled than that no judge of a court of record is liable to action for a judicial act, although in many of the cases distinctions are made between the liabilities of judges holding courts of limited jurisdiction and superior or general jurisdiction." For the purpose of this demurrer he does not consider it necessary, however, to determine whether the United States Court was of a limited or general jurisdiction. After citing various opinions, he concludes that in this case the plaintiff having been convicted and suffered one of the alternate punishments to which alone the law subjects him, his sentence to be imprisoned for an offence which he had already expiated, was without authority and a violation of the common law and the constitution. Furthermore, after a careful examination of the authorities, he is of opinion that a judge of a court of general jurisdiction, who attempts to enforce a judgment which he knows to have been satisfied, makes himself liable in an action. The demurrer is therefore overruled, with leave to the defendant to answer on payment of costs.

"Due Process of Law"—When Denial of Personal Notice in Civil Actions is Unconstitutional.

We publish in another place a very interesting opinion of the Supreme Court of Mississippi, by Mr. Justice Simrall, which holds that a statute which authorized the sale of lands in certain counties, for taxes to build levees, without personal notice to the owners of the land, but which provided for the publication of notice in a newspaper published at Jackson, and which further provided that "neither the state nor any party, person or corporation interested therein, be made defendant by name, designation or description," is unconstitutional, being in conflict with those clauses of the Mississippi bill of rights which prohibit the deprivation of property without "due process of law" or contrary to "due course of law." In other words, it holds, as we understand it, that it is incompetent for the legislature to provide, in a statute prescribing a judicial proceeding for the sale of land for taxes, that *resident* land-holders, whose names and places of residence are known, shall be proceeded against by the publication of a general notice, directed to a certain class of individuals, and not designating the separate land-holders by name. We take it that the court does not intend to hold that it would be incompetent for the legislature to authorize a proceeding by constructive notice, even against residents of the county in which the land lies, where the advertisement separately sets out and adequately describes each tract or parcel of land proceeded against, and designates the owner by name. Such a conclusion would impugn the universal course of proceeding in enforcing the payment of taxes in this country, and would be without support in any decision of which we have knowledge. We believe that the contrary principle has been established wherever it has been contested, and is now universally acquiesced in. For decisions upholding the summary proceedings which have been instituted for the collection of the public revenue, see the following: McCarroll v. Weaks, 2 Tenn. 215; State v. Allen, 2 McCord, 56; Harris v. Wood, 6 Monr. 643; Doe v. Deavors, 11 Ga. 79; Morton v. Reeds, 6 Mo. 64; Bergen v. Clarkson, 1 Halst. 352; Livingston v. Moore, 7 Pet. 469; *In Re* New York Schools, 31 N. Y. 574; Griffin v. Mixon, 38 Miss. 437; Willard v. Weatherbee, 4 N. H. 118. "If," said the Supreme Court of Tennessee in McCarroll v. Weaks, *supra*, "the government were necessitated to take the cautious and tedious steps of the common law, in giving personal notice, making up regular pleadings, and having a trial by jury, judgment and execution, it would cease to exist for want of money to carry on its operations; loss of credit and a total extinction of national faith, the basis of all regular governments, must be the inevitable result."

Whether Mr. Justice Simrall is correct in classifying proceedings to sell land for taxes, as proceedings *in personam*, may, perhaps, admit of question; but as it is a question which concerns merely the propriety of a definition, we shall not discuss it. Whilst we are not entirely satisfied with the reasoning of the learned justice, we presume that the result which the court arrive at will meet with general satisfaction. As we understand the case, it amounts simply to an affirmance of the principle that it is beyond the power of the legislature to authorize a proceeding whereby a man's land is sold for taxes *without notice*. For such a notice as that authorized by the statute in question—an advertisement published in a newspaper at the seat of government of the state, and not in a paper published in any of the counties in which were situated the lands upon which the tax had been levied; a notice directed merely to a class of persons, which neither mentioned by name any land-owner charged with being indebted for taxes nor described any tract of land as to which there was an alleged delinquency;—was manifestly equivalent to no notice at all, and manifestly could not be the foundation of any proceeding judicial in its nature, in which notice, actual or constructive, is required. That it is beyond the power of the legislature to authorize a proceeding by which land is sold for taxes without any notice at all, was affirmed by the Supreme Court of Missouri in a very satisfactory opinion by Judge Holmes in Abbott v. Lindenbower, 42 Mo. 162, 169. The same view was enforced by the High Court of Errors and Appeals of Mississippi in 1860, in an opinion of great vigor delivered by Judge Harris, in the case of Griffin v. Mixon, 38 Miss. 424, 433, against views of Handy, J., who dissented. The act of the legislature, which was overthrown in this last case, went so far as to provide for the forfeiture to the state of land for taxes simply on the return, under oath, of a delinquent list by the tax collector, without any judicial proceeding whatever. In the opinion of the court, Harris, J., eloquently observed: "It is for those who claim to derive a right under a power so extraordinary, to inform us whence it is derived and where it may be found; or in what moment of folly or infatuation, an intelligent people, desiring rational liberty, cautious of restraint and jealous of power, have thus abandoned one of the cardinal rights for the protection of which free governments are instituted."

To Correspondents.

An unusual pressure of work during the past month has obliged us to defer attending to a number of queries, and lack of space has obliged us to hold over several valuable communications. If correspondents do not get letters explaining the causes of such inattention and delay, we beg them to consider the circumstances under which an editor labors, the multitude of things which press upon his attention, and the great number of private letters he is obliged to write each day in addition to his other labors. It has sometimes happened that we have omitted to acknowlege the reception of contributions. Should this again occur, correspondents will please understand that their contributions are accepted and will be published whenever our space will permit. We will always return contributions which we are unable to use, if the writer so requests. It is unnecessary to state that we shall adhere to a rule which journalists have found necessary for their own protection—not to notice anonymous communications.

In sending us opinions of courts for publication, correspondents should remember that we shall endeavor, during the coming year, to publish in full only such decisions as are *novel, important* and of *general interest.* By analyzing the meaning of the words which we have italicised, it will be seen that a decision may be novel, and yet neither important nor of general interest. Again, it may be both novel and important, and yet of very little interest outside of the state in which it it is rendered. We need not remind correspondents that our space will not permit us to publish decisions which relate merely to questions of local practice, or which involve only an exposition of local statutes which do not exist in other states. It must not be thought, however, that because a decision relates to a question purely statutory, it may not be of general interest. The number of cases in the reports of the various American courts which relate to questions governed by statute, now greatly exceeds those which relate to what is inaptly termed the unwritten law. Besides, there is such a kinship between the leading statutes of the different states that discussions upon the statutes of one state are constantly quoted as pursuasive authority in expounding similar statutes in other states. Thus, discussions relating to mechanics' liens, homestead and exemption laws, the discharge of sureties by creditors delay after notice, the degrees of homicide, taking land for the construction of works of public utility, the police of railways, taxation and tax titles, and many other subjects that might be named, which rest entirely upon statutory enactments, may possess a very general interest, by reason of the fact that most, if not all the states, have statutes on those subjects.

Correspondents who favor us with original articles, should remember that the aim of a weekly law journal is *practical usefulness;* and whilst we desire to make the JOURNAL, to some extent, an organ of enlightened opinion; yet, as a general rule, long discussions of questions not practical in their character, are not suited to our columns. In discussing questions which have been passed upon by the courts, an intelligent presentation and judicious criticism of adjudicated cases, will be, we believe, most acceptable to our readers. We presume that correspondents will not take offence if we give them the advice which several of our readers have not hesitated to give us, that lawyers are much more concerned to know what the courts have decided, than what any private individual may think. Still we hold it to be not only the privilege, but also the duty, of law-writers to criticise, without hesitation, judicial decisions; and he who has not the ability to conduct a judicious discussion of this kind, from an original point of view, should never take up his pen to write upon legal subjects. He lacks even the most essential quality of a good digester.

Some Recent Decisions in Bankruptcy.

SUPERVISORY JURISDICTION OF CIRCUIT COURT UNDER SECTION 2.

Stickney, Assignee, v. Wilt (U. S. Supreme Court, 11 N. B. R. 97), affirms the cases of Morgan v. Thornhill, 11 Wall. 72; Smith v. Mason, Ibid. 419; Marshall v. Knox, 16 Ibid. 556, and Coit v. Robinson, 19 Ibid. 274, as to construction of second section of bankrupt act of 1867. The assignee obtained a decree of the district court declaring certain liens claimed by Wilt upon the lands of the bankrupt, inoperative as security. Wilt filed his petition for review under the first clause of section 2d of the bankrupt act, in the circuit court, and the assignee filed a plea to the jurisdiction. The circuit court overruled the plea to the jurisdiction, and reversed the decree of the district court, whereupon the assignee appealed to the supreme court. The supreme court held that this case did not fall within the supervisory jurisdiction conferred upon the circuit court by the first clause of said section 2d, and hence that the circuit court acted without jurisdiction in the premises. But the supreme court, following the decisions mentioned above, further held that there was no appeal from the decree of the circuit court, rendered in a petition of review in such cases, and hence that the supreme court was without jurisdiction to hear and determine the merits of the case.

Instead, however, of dismissing the appeal from the circuit court, which would have left in full force a decree of the circuit court rendered without jurisdiction, reversing the decree of the district court which had jurisdiction, the supreme court, admitting its own want of jurisdiction, reversed the decree of the circuit court, and remanded the cause, with direction to dismiss the petition for review for want of jurisdiction. The result is, to leave Wilt where the decree of the district court left him, except that he has obtained by some years of litigation the following consolatory paragraph in the opinion pronounced by Mr. Justice Clifford:

> Unable to refer the appellee to any legal remedy, as matter of right under the present pleadings, it seems to be proper, in the judgment of the whole court, to suggest that it may be that the district court will grant a review of the decree rendered in that court, if a proper application is presented for that purpose, which would lay the foundation, if it be granted, in case of an adverse decision upon the merits of the case, for a regular appeal to the circuit court.

With such a suggestion from the supreme court, it is hardly probable that the district court will refuse a rehearing of the cause, and quite as improbable that either party will submit to the decision of the district court upon the re-hearing. We may expect, some years hence, again to find this case in the reports of the supreme court. Meanwhile, creditors of the bankrupt await their dividends, or, it may be, contribute funds towards the prosecution of this litigation.

The uncertainty of section 2d of the bankrupt act has resulted in many delays, and much expense in the administra-

tion of bankrupt estates. It would seem, however, that there would now be no reasonable excuse, in the light of the foregoing decisions, for counsel mistaking their remedy. Had Wilt *appealed* from the decree of the district court, instead of seeking his redress by writ of review, his law-suit would now be at an end.

COMPOSITIONS.

In re Gilday, 11 N. B. R. 108. In this case Judge Blatchford construes the composition clause of the act of June 22, 1874, so as to exclude creditors, whose debts do not exceed fifty dollars each, from the whole number of creditors, in determining whether two-thirds in number of the creditors have signed the composition. The same point was ruled by Krekel, J., in the case of Wald & Aehle, 1 CENT. LAW JOUR. 531.

EXAMINATION OF BANKRUPT—RIGHT OF BANKRUPT TO BE FURTHER EXAMINED IN HIS OWN BEHALF.

In re Noyes, Ibid. 112. Judge Lowell overrules Scofield v. Morehead, 2 N. B. R. 1, and *Re* Mealy, Ibid, 128; and holds that a bankrupt, under examination, has the right to be cross-examined, or further examined in his own behalf, so far as may be necessary to explain or qualify any matters brought out in the direct examination, which may seem to bear unfavorably upon his conduct or dealings, or which are obscure; and that the costs of such cross-examinations are not taxable against the bankrupt. E. T. A.

Constitutional Right of Personal Notice in Civil Actions.

N. G. D. BROWN v. BOARD OF LEVEE COMMISSIONERS.

Supreme Court of Mississippi, October Term, 1874.

Hon. EPHRAIM G PEYTON, Chief Justice.
" HORATIO F. SIMRALL, } Judges.
" JOHATHAN TARBELL. }

1. **Jurisdiction.**—It is essential to the validity of a judgment, or decree, that the court should have jurisdiction.

2. **Judgment Suits in Rem.**—The "thing" must be subject to the cognizance of the court, and amenable to its decree.

3. **Judgment Suits in Personam.**—The right to adjudicate, so as to conclude the defendant, is conferred by *notice* actual or constructive, according to a prescribed formula.

4. **Power of Legislature over Process.**—The provision of the bill of rights, "that no person shall be deprived of life, liberty or property, except by due process of law," inhibits the legislature from dispensing with personal service, where it is practicable, and has been usual under the general law. It does not take from the legislature power to amend the law and change the formula of remedies—provided the fundamental right of personal notice, actual or constructive, in personal suits, is not taken away.

5 **Case in Judgment.**—The statute authorizing the suit, prescribing the mode of procedure, and the decree of sale, are condemned as unconstitutional, because it dispenses with personal notice, when the defendants, or many of them, were residents of the county and state, and amenable to such process; because the legislature attempted to change a suit, which according to the "law of the land," was *personal* into a proceeding *in rem*, so as to dispense with personal notice; because the defendants had, or may have had, diverse and independent interests in the land, conflicting with each other and the complainants, and were so numerous that it would be impracticable to unite them in one suit, and adjudicate the numerous collateral controversies that might arise; because the statute and suit under it are unusual, extraordinary, and without precedent, legislative or judicial, in the history of the state.

Mr. Justice SIMRALL delivered the opinion of the court.

This was a suit in chancery, brought by the Board of Levee Commissioners, under the provisions of an act of the legislature, passed in April, 1872. In 1865 the complainant was created a body corporate, "for the purpose of rebuilding, strengthening, or elevating the old levees in the counties of Bolivar, Washington and Issaquena," and by the terms of the act, an annual tax was imposed upon all the lands in those counties until 1879, for that purpose, which was a lien upon the land. To enforce collection, the collector was authorized, on the second Monday in April, to sell the lands of delinquents for cash, and on the failure of other persons to bid the amount due, then the lands should be struck off to the treasurer of the board. From year to year a large number of sales were made to the treasurer, many of which lands are still held as the property of the board.

The prayer of the bill is, that the court will decree a sale of the lands, or such parts and parcels thereof as may be necessary to pay the amount of taxes stated to be due thereon, etc., under the act of April, 1872. No notice of the suit to sell the delinquent lands was required, except a general publication in a newspaper, published at Jackson, Mississippi. The act further provided that neither "the state or any party, person or corporation interested therein, be made defendants by name, designation or description."

It is insisted by the plaintiff in error, that the decrees of sale founded upon the petitions and exhibits and notice, are invalid, because it is an effort to deprive them of property "without due process of law." And that the remedy pursued is not according to "due course of law." Sec. 2, Art. 1 Const. of Miss. and Sec. 28. The original of the grand principle embodied in the second section 1st Art. of the Constitution, is in the *Magna Charta*, and was designed primarily to shield persons and their property from the invasions of the prerogative and arbitrary power of the King. The great charter, and subsequently the American constitutions, declare the fundamental principle of the absolute involability of life, liberty and property against the encroachments of arbitrary power, and forbid a deprivation of either, by any form of power or authority, except it be "as in *Magna Charta*," *per legale judicium parium snorum, vel per legem terræ*," or, as written in some of the constitutions, "by the law of the land or the judgment of his peers;" and in others "due process of law," and "due course of law," and "according to the law of the land."

Mr. Webster gave an exposition of the meaning of the words "law of the land," and "due process of law," in his argument in the Dartmouth College case, reported in 4th Wheaton, which has secured the sanction of the courts. "By the law of the land, is most clearly intended the general law, which hears before it condems—which proceeds upon enquiry and renders judgment only after trial. It means that every citizen shall hold his life, liberty, property * * under the protection of general rules which govern society." Taylor v. Porter, 4 Hill (N. Y.) 140; Griffin v. Dogan & Martin, 48 Miss. 21.

These terms, "law of the land," "due course of law," "due process of law," "do not mean the general body of laws, common and statute," as it was at the time the constitution took effect. For that would seem to deny to the legislature the power to alter, change or amend the law.

Yet we know it is every day's practice for the law-making department of the government, to repeal old laws, enact new and change remedies. The principle does not demand that the laws existing at any point of time shall be irrepearable, or that any forms of remedies shall necessarily continue. It refers to certain fundamental rights, which that system of jurisprudence, of which ours is a derivation, has always recognized. If any of these are disregarded, in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by "due course of law."

Some subjects are cognizable in one court, and others in another. What would be due process of law in one proceeding, might not be in another.

The nature of the suit, and how the judgment will operate, and upon what, must be looked at in determining, whether the proceeding has been conducted according to due process of law. In our system there have existed remedies which affect the person—suits *inter partes*—remedies which are of a mixed nature, touching

both a person and a "thing," and remedies which are purely and simple *in rem*, which affect, or may affect, the subject-matter or thing only. These several remedies are not necessarily peculiar to particular courts, as those which pursue the common law, those which are of equity jurisdiction, or admiralty. It is fundamental to all judicial proceedings, no matter what the constitution of the court and its form of admistering justice, that it must have jurisdisdiction. It is essential to the validity of the judgment of every court that it should have jurisdiction over the subject; and in addition, wherever the action or suit is personal, over the defendant to be charged thereby. In personal suits, that which gives the court cognizance over the defendant, is notice of the suit in some prescribed form.

In proceedings "in rem," the thing or "matter" affected by the decree, must be subject to the dominion of the court; its *situs* must be such as that the judgment may be operative upon it. In the strict technical suit, the thing in some appointed mode is placed in the power of the court, generally by a seizure and possession by an officer; as a vessel captured from an enemy on the high seas, or for violating a blockade, or seized for violating the navigation and import laws, or liquor or tobacco taken into possession by the marshal, because held or offered for sale in contravention of the internal revenue laws. In these and in such like cases, the judicial process goes against the "thing" which is in the custody of the court through its officer, and which is technically the defendant. Mankin v. Chandler & Co., 2 Brock, Rep. 127–8; Freeman on Judgments, Sec. 611. In these cases, parties interested in the "thing," were named by proclamation and published notice, to prefer their claims.

There are other suits of the nature of proceedings *in rem*, such as the probate of wills, grant of administration, condemnation of private lands for public highways, etc. Freeman on Judgments, Sec. 606 to Sec. 614; 2 Starkie Ev. 22 to 230, and Stewart v. Board of Police of Hinds County, 25 Miss. 480, 481–483. In these instances the judgment operates upon the *situs* and relations of the subject-matter, and by force of the judgment imposes a new relation, as in the last case cited. The relation of the law to the private owner is changed, and a new relation, that of dedication to the public use, imposed upon it. 2 Smith Leading Cases, 660.

Persons are not made parties by name to these suits, and when they come into the litigation it is as intervenors. Nor is it essential to the jurisdiction that the owner, or any person having interest in the "thing" to be affected by the judgment, should have notice, other than such as is implied in the seizure itself. Every person is concluded by the judgment, because it is open to the world to intervene and assert its right. The judgment binds everybody. There is no such thing as personal parties, who, with their privies are estopped and concluded, and nobody else, as in personal suits. Stewart v. Board of Police, 25 Miss. 480; N. O. J. & G. N. R. R. Co. v. Hemphill, 35 Miss. 23. Whilst "process" is in the power of the legislature, it must respect that ancient and fundamental right which has always belonged to parties sought to be charged in their persons and property, that they should have notice of the suit. Courts of common law and equity cognizance, have always exacted personal notice if practicable, that is, if the defendant was within the territorial jurisdiction and if he could be found. But in order to prevent a failure of justice, *ex necessitate*, if personal notice could not be given, an inferior mode, such as in the wisdom of the legislature might be thought likely to impart actual notice, has been allowed; such as leaving a copy of the summons with a member of the defendant's family, or affixing it to the door of his domicil, and, in certain cases, by publication in a newspaper. The several common law modes of compelling the appearance of the defendant in court, were: 1. The summons; 2. The writ of distringas; 3. The *capias ad respondendum*; and finally, proclamation and outlawry. The obdurate defendant was subject to a distress of his goods, and the issues of his land, until exhausted, and then to the arrest of his person. 2 Black Comm. 3 Book, pp. 279, 280. The relaxation which has been allowed, and the extent of it, has been to substitute an inferior mode of giving notice, which would be apt to accomplish that result, and that, in cases of necessity, to avoid a failure of justice. It is just, that property in this state should be held liable to a creditor, notwithstanding the absence or non-residence of the debtor. It would not violate the due process of law to seize that property by judicial process, and hold it amenable to the debts of the adsconding or non-resident debtor. To that extent it is a proceeding *in rem*; but in this case the statute has always required some mode of publication most apt to give notice to the debtor. But if the debtor is not served or does not appear and personally submit to the jurisdiction of the court, a personal judgment would be void. Holman v. Fisher, Executor, 49 Miss. Rep.

To illustrate the principle upon which constructive notice rests, and the extent of it, reference is made to Matter of City Bank, 18 N. Y. 215; Happy v. Mosher *et al.*, 48 N. Y. 317; Harris v. Hardeman, 14 How. U. S. 339; Nations v. Johnson, 24 How. U. S. 202; Voorhees v. Bank of U. S., 10 Peters, 449; Mason v. Messinger & May, 17 Iowa, 266; Beard v. Beard, 21 Ind. 322.

In the history of the "due course of law," can any precedent be found of a suit intended in so peremptory and speedy a manner to conclude so many parties and so many and such various rights? One has been cited for the plaintiff in error quite analogous to this: Webster v. Reid, 11 How. U. S. 459, which was characterized by the court as extraordinary. An act was passed by the territorial legislature of Iowa, with a view to settle claims to the lands owned by the Half-breed Indians in Lee county—partition them or make sale for the benefit of the claimants. Brigham, Wilson and Young, were appointed commissioners to carry out the object—who were to receive six dollars per day for their services. Judgments were obtained by two of the commissioners for their services, and had under those judgments, the entire tract of the Half-breeds was sold. Suit was brought under a special statute, requiring notice of publication in a newspaper with no other "designation" of the defendants than "owners of the Half-breed lands in Lee county." Held, that the judgments under which the lands were sold, were void. The reason assigned is that the defendants did not have notice.

In the case at bar, the notice was addressed to "all persons claiming interest in the lands." The parties interested may be as numerous as in the case cited, but with this distinguishing difference, that their interests were in severalty under separate titles, without a single element of even tenancy in common; whereas, it appears that the Half-breed Indians were co-tenants. But there is no instance in our legal history where a judicial process has been allowed in personal suits, dispensing with notice actual or constructive, addressed to the parties named to be charged thereby, where it could be readily ascertained who they were. As we have seen, the practice has been so uniform and ancient, that the defendants must be named if known; and that they must have personal notice by due service, or a constructive notice by some means which the legislature has prescribed as calculated to come home to the parties. That a departure from it in a special case would be obnoxious to the objection that it was not according "to due process of law."

It is manifest that many, if not most of the persons claiming these lands, were residents of the state and of the respective counties where the suits were brought. It is also evident that the names of many, if not most of those were known, or could have been known to the levee commissioners. Yet the law directed that they should not be made defendants by name or other description. The statute was framed on the idea, that because the act of 1865 imposed upon the land a lien for the taxes, that it was competent to give a remedy in the nature of a suit *in rem*. The lien was given to make the demands of the levee board paramount to all encumbrances which the tax-payers could impose, or suffer on their property.

But if the suits were mainly dependent for support on the liens, it did not thereby become a proceeding *in rem*, any more than would detinue, replevin or foreclosure suits of mortgages, or other liens. 2 Brock. (*supra*). It is *ultra vires* of the legislature to break down the essential and fundamental distinctions and differences which have always existed in the nature of judicial process. In those trials affecting life, liberty or property, where, according to the system of the law transmitted to us, the jury have been the triers of the fact, the constitution assures that mode of trial by declaring: "The right of trial by jury shall *remain* involate." If, in the judicial history, which has borne upon its current a body of jurisprudence to us, it has ever been the "right" of the people in personal suits to be notified in some appointed formula of the proceedings against them, so that they may have opportunity to appear and make defence, then that *right* is guaranteed by putting a restraint upon organized power not "to deprive of life, liberty or property," except by "due course of law" or "due process of law."

Our jurisprudence has always regarded suits to recover chattels or to foreclose a mortgage, as personal suits, entitling the defendants to personal notice. If the legislature should enact that hereafter they shall be proceeeings *in rem*, and that the seizure of the horse or other effects, or of the mortgaged premises, should confer jurisdiction and operate as constructive notice, it would be too plain for argument that the legislature was without power to thus interrupt and turn aside the "due course of law."

Propety is older than governments and constitutions. The right of life, liberty and property, was not conferred by society. The highest duty of goverment is to protect persons in their enjoyment. From the earliest ages of the common law these natural rights have been hedged with certain immunities and privileges, which experience has shown to be necessary for their security and defence. For centuries the inviolability of persons and property against unusual and extraordinary invasions of power, has been the birthright of British subjects. From *Magna Charta*, that fundamental principle has been transcribed into the American constitutions. It is the chief distinguishing characteristic of the jurisprudence to which it belongs. That great doctrine, with the trial by jury, have largely aided to develop a strong and vigorous civilization, and free governments. Chiefly because these absolute rights are placed beyond the reach of executive and legislative power, exerted in an extraordinary and unusual manner, has the Anglo-Saxon race exhibited such devotion to the common law; and have conserved in this country its beneficent principles in constitutional guarantees.

We think the special statute under which the suit was brought, is in contravention of the constitution, because,

1. It proposes to bind and conclude the interests of persons in private property, without designating them by name as defendants; without a good, or sufficient reason for such departure from the general law.

2. Because it expressly denies personal service of process on the defendants, when it is evident that many, perhaps most of them, are residents of the county and state, and amenable to such process.

3. Because in a personal suit it directs notice by publication, without designating the names of the defendants, when many, if not most of them, by the general law, were entitled to personal service of notice, and when the form of publication directed, is allowable only in instances where the complainant does not know, and has not the means of finding out, the names of parties.

4. Because it allows a judgment against a very large, but indefinite number of persons, who have, or may have conflicting interests as against each other, as well as the complainant; when rights may be different in origin and extent, so that it would be impossible, according to the modes of procedure under the general law, to bring such a multitude of persons before the court, as to investigate, determine and adjust in one decree the number of independent litigations that might arise. That being impracticable if not impossible in the due course of the law, it is not competent to accomplish it in the extraordinary mode authorized by this statute.

5. Because the statute, and the proceedings had under it, are unusual, extraordinary, and not calculated to afford a full investigation and proper determination of every separate controversy that might arise; but likely to result in wrong and injustice to many individuals.

6. Because the suit authorized is extraordinary and unusual, without precedent in the legislative and judicial history of this state.

7. Because the statute has the seeming of giving judicial sanction, and thereby conclusiveness, to a decree for the sale and transfer of property, when the legislature itself [is not competent] to direct the sale to be made, and when, according to the "law of the land," the chancery court would not take cognizance and adjudge in the circumstances named in the act.

We are of opinion, therefore, that the decree of the chancery court is *coram non judice*, and is of no validity, and the same is reversed. DECREE REVERSED.

Bankruptcy—Rents Accruing after Adjudication—Landlord's Lien for Rent.

IN RE SHULMAN, FRANKFURTER & CO., BAILEY, ASSIGNEE, v. LOEB & BROTHER.

United States Circuit Court, Middle District of Alabama.

Before Hon. WILLIAM B. WOODS, Circuit Judge.

1. **Bankruptcy—Rents Accruing after Adjudication.**—The bankrupts leased premises for one year, and were adjudicated bankrupt within two months after the beginning of the term: *Held*, that rent which accrued after the adjudication, could not be proved or allowed as a debt against the bankrupt estate.

2. ——. **Landlord's Lien.**—Where the law of the state gave the landlord a lien upon the goods and chattels on the demised premises, to secure the rent for one year, and the lessees were adjudged bankrupt before the end of the year: *Held*, that the landlord had no lien on the goods and chattels for rent which accrued after the bankruptcy.

3. ——. ——. **Priorities—Execution Creditor.**—The law of Alabama (Rev. Code, Sec. 2878), does not give the landlord a lien for his rent upon goods and chattels of a tenant found upon the premises, held by lease for one or more years, but as between an execution creditor and the landlord, simply declares that the latter shall be entitled to priority of payment out of the proceeds of the goods, to the extent of one year's rent.

This cause was a petition to review the action of the district court sitting as a court of bankruptcy, and was heard at the November term, 1874, of the circuit court.

Messrs. M. D. Graham and *H. A. Herbert*, for the petitioners; *Mr. David Clopton, contra.*

WOODS, J.—The conceded facts are as follows: The defendants, Loeb & Brother, are the owners of a store-room in the city of Montgomery. They leased the same to the bankrupts, Shulman, Frankfurter & Co., for the term of one year, commencing on the first day of October, 1873, for a yearly rent of $1800, payable in monthly installments of $150. A petition in involuntary bankruptcy was filed against the lessees on the 25th of November, 1873, and they were soon after adjudged bankrupts. At the date of the adjudication, they were the owners of a stock of goods which were upon the demised premises. The goods were seized by order of the bankrupt court, and remained on the premises until they were sold out by the assignee, who received the proceeds of the sale, which were more than enough to pay the rent for the entire year. The bankrupts did not occupy the store after they were adjudicated bankrupt, but it was occupied by the assignee from that date up to the 28th of January, 1874. After the last-mentioned date, the assignee did not occupy the premises, nor did he let them to any other person. The rent of the store-room was paid in full, up to the time of the bankruptcy, and the assignee paid, as a part of the expenses of administration, the rent from the date of the

bankruptcy, up to the 28th of January, 1874. On that day he gave up the possession of the premises to the landlords, it being stipulated that they would not hold the assignee individually liable upon any claim for rent, and the assignee agreeing that the acceptance of the premises by the landlords, should not affect any rights or liens against the bankrupt's estate, which the landlord might have for the payment of rent to accrue after January 28th.

Loeb & Brother claimed to have a lien upon the goods which were upon the premises at the time of the bankruptcy, for the eight months' and three days' rent, from January 28th to October 1st, 1874. They applied to the district court to order the assignee to pay out of the proceeds of the goods the said rent, amounting to 1$200. That court directed the assignee to pay them $600, and required them to give up any further claim. The assignee, claiming to be aggrieved by the action of the district court, has filed this petition and asks that the order of the district court may be reviewed and reversed.

The defendants, Loeb & Brother, claim that the rent which fell due after the 28th of January, 1874, is a debt provable against the bankrupt estate, and that under the laws of Alabama, they had a lien for its payment upon the stock of goods which were stored upon the leased premises at the date of the bankruptcy, and that they were entitled to priority of payment out of the proceeds of the goods for the rent, up to Oct. 15, 1874.

The first question presented for decision is, therefore, can rent, to accrue in future, after an adjudication in bankruptcy, be proven and allowed as a debt against the bankrupts' estate?

The 19th section of the bankrupt act describes what debts may be proven, and it declares that no other debts than those specified in this section, shall be proven or allowed against the estate. The case of rent falling due in the future at fixed and stated periods, is specially provided for as follows: "When the bankrupt is liable to pay rent, or other debt, falling due at fixed and stated periods, the creditor may prove, for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods." The meaning of this clause admits of no doubt. In the case of rent falling due at fixed and stated periods, the creditor may prove his claim for so much rent as had accrued at the date of bankruptcy. For instance, if the rent is $1200 per annum, payable in quarterly installments of $300, and at the close of the second month of a quarter the lessee is adjudged bankrupt, although there may be no rent yet due, nevertheless, the landlord may prove his claim for $200, the rent accrued at the time of the bankruptcy. But the last clause of the 19th section says he shall prove for nothing more. So a proportionate part of debts, other than rent falling due at fixed and stated periods, may be proven in the same way. For instance, a business man has a manager or book-keeper hired by the year, at a salary payable quarterly. At the end of two months he is adjudged bankrupt. His manager or book-keeper may prove for a proportionate part of his salary up to the time of the bankruptcy, but he cannot prove for any part that may accrue and fall due after the bankruptcy. The clear purpose of the bankrupt act, is to cut off all claims for rent to accrue, or for services to be rendered after the date of the bankruptcy. These views, so far as the question of rent is concerned, are supported by the following cases: *Ex parte* Hougton *et al.*, 1 Lowell's Decisions, 554; *In re* Webb & Co., 6 N. B. R. 302; *In re* May & Merwin, 9 N. B. R. 419. The only case I have found where a contrary view is taken is *In re* Wynn, 4 N. B. R. 5. In the case of Trim, 5 N. B. R. 23, cited by counsel for defendants, it does not appear whether the landlord was allowed to prove for rent which accrued after the bankruptcy or not. The case of Longstreth v. Fenner, 7 N. B. R. 449, also relied on by defendants, only decides that the assignee should pay the rent up to the date of bankruptcy, and for such time as he actually occupied the premises after bankruptcy. It does not decide that a claim for rent after the bankruptcy is provable; for what the assignee pays for the time during which he occupies the premises is part of the expenses of administration, and is not paid as a debt of the bankrupt estate. In the case of Lonstreth v. Fenner, no rent was claimed or allowed beyond the time when the assignee deliverd up the premises. The 19th section of the bankrupt act, is so clear upon the point under discussion, that it would require very great weight of authority to show that the rent, falling due at fixed and stated periods after the date of the bankruptcy, could be proven as a debt against the bankrupt estate. The law says plainly that such a claim shall not be proven or allowed. I am, therefore, of opinion that the claim of Loeb & Brother, for rent falling due after the 28th of January, 1874, which was after the bankruptcy, and after the surrender of the premises by the assignee, cannot be proven or allowed as a debt against the bankrupt estate.

It seems to be a necessary consequence of this, that Loeb & Brother can have no lien upon the assets of the bankrupts for any such claim. The bankrupt estate owes them nothing; they have no debt which the bankrupt estate is liable to pay. The existence of a lien upon the bankrupts' goods presupposes a debt which their goods are liable to pay. As there is no claim or debt, there can be no lien. The language of the 20th section of the bankrupt act seems to sustain this view. It is when a creditor has a lien on the real or personal estate of the bankrupt "for securing the payment of a *debt owing* to him from the bankrupt," that provision is made for preserving the lien. Rent, to accrue in the future, cannot be called a "debt owing." In fact it is well settled that it is not a debt at all, contingent or otherwise. Aurial v. Mills, 4 T. R. 94; Lansing v. Pendergrast, 9 Johns. 127; Savory v. Stocking, 4 Cush. 607; Bosler v. Kuhn, 8 Watts & S. 183; English v. Key, 39 Ala. 115. In the case last cited it was held by R. W. Walker, J., that "except where it is payable in advance, no claim for rent arises until the lessee has enjoyed the premises for the whole time for which the payment of rent is stipulated to be made."

But even conceding that at the date of the bankruptcy there was a debt owing from the bankrupts to Loeb & Brother, on account of rent yet to accrue, which might be proved and allowed against the bankrupts' estate, is it a fact that under the laws of Alabama, such debt was secured by a lien upon the goods of the bankrupts found upon the leased premises? The statute, under which Loeb & Brother claim their lien, declares that "no execution must be levied on goods or chattels in possession of and upon the premises of a tenant, held by lease for one or more years until the rent due, or to fall due during the current year, is paid or tendered to the landlord; * * * and the sheriff executing the writ must levy and sell as well for the repayment of the rent so tendered as for the satisfaction of the execution." Rev. Code of Alabama, sec. 2878. Clay's digest of Laws of Alabama, 506, sec. 3, contains a similar provision applicable to crops. It declares that, "the crop grown on any rented land in this state shall not be taken by virtue of any execution, or removed off the premises of any such rented land, unless the party so taking the same, shall, before removal of the crop from such premises, pay or tender to the landlord or lessee thereof, all money due for the rent of said premises at the time of taking such crop in execution; provided such rent or arrears do not amount to more than one year's rent; * * * and the sheriff, or officer levying the same, is hereby empowered and required to levy and pay to the plaintiff, as well the money so paid for rent, as the execution money." This last cited law has been construed by the Supreme Court of Alabama. In Fraser v. Thomas, 6 Ala. 169, it was held that this law did not give the landlord a lien upon the crop raised on rented land; it merely declared that as between the landlord and an execution creditor, the former should be entitled to preference to the extent of one year's unpaid rent.

I am unable to distinguish any material difference between the

two statutes cited. If the latter does not give a lien, neither does the former. The ruling of the Supreme Gourt of Alabama, just cited, is followed in North v. Eslava, 12 Ala. 240, and Ducher v. Harris, 13 Ala. 465. However much these rulings may be opposed by high authority, they are a construction of a law of this state which this court feels bound to follow.

As there was no execution levied in this case, I am of opinion that Loeb & Brother did not acquire any lien for rent on the goods of the bankrupt found on the demised premises. On all grounds, therefore, their claim to priority of payment out of the proceeds of said goods, should be disallowed.

The result is, that the district court fell into error in recognizing the claim and lien of Loeb & Brother for $600. The order of the district court complained of is therefore annulled and the claim and lien of Loeb & Brother disallowed.

ORDER ANNULLED.

Informalities in Bonds taken in Judicial Proceedings.

SAMUEL L. STEPHENS v. GREEN COUNTY IRON WORKS.

Supreme Court of Tennessee, September Term, 1873.

Hon. A. O. P. NICHOLSON, Chief Justice.
" P. TURNEY,
" ROBERT MCFARLAND,
" JAMES W. DEADERICK, } Judges.
" THOS. J. FREEMAN,
" JOHN L. T. SNEED,

Replevy-Bond.—The validity of a replevy-bond, under the code of Tennessee, is not affected by a failure to recite the levy, or to make any reference to the property. It is sufficient if it ascertains the suit, the amount of money to be paid and the event n which payment is to be made.

Opinion of the court by FREEMAN, J.

This is an attachment bill, filed to collect an indebtedness due complainant by defendant—a non-resident corporation. An attachment issued and was levied by the sheriff of Green county, on a lot of pig iron as property of defendant.

The defendant appears and files an answer, making several defences to the bill, and the case was heard on bill and answer and exhibits, without any proof being taken. The chancellor dismissed the bill, and complainant appeals to this court. We do not deem it necessary to notice but one of the defences as set up in the answer. It is insisted in the answer that complainant is precluded from bringing this suit by the fact alleged, that defendant had some time before conveyed a considerable amount of property by deed of trust to secure this debt—said property, however, remaining in the possession of the defendant. This can be no defence to any suit prosecuted either at law or equity for the recovery of the debt. If the debt is recovered in this proceeding, or is paid by the defendant, the property is discharged from the trust, and defendants have their property free from the incumbrance. It is well settled that a mortgage, or deed of trust, is but a security for the debt, and a creditor by note or other legal evidence of debt, may at his election bring his action on the note or legal liability, or proceed upon his mortgage or trust security; and a judgment on the note, without satisfaction, is no bar to a proceeding in equity to foreclose a mortgage. 1 Hilliard on Mort. 97; 2 Ibid., 83; Vansant v. Almon, 23 Ill. R. 33; Addison on Contracts, 307.

There is, therefore, nothing in this defence, and the chancellor's decree dismissing the bill on this ground, was clearly erroneous. The only question presenting any difficulty in this case, arises out of the following state of facts: The sheriff returns that he levied the attachment on 104 tons of pig-iron, as the property of Green County Iron Co., on the first of December, 1871; and that on the 14th of March, 1872, the company executed a bond, with W. J. Gleason, C. Lesier and I. G. Reaves as securities, payable to complainant in the sum of $5,000, conditioned to pay to complainants the full sum of his demand against said company, should the cause be determined in favor of complainant at the hearing; and he returns the same "as a delivery-bond." We take it he means a replevy bond under section 3509 of the code. We find a bond in the record corresponding with this return. The bond, however, does not recite the levy of the attachment upon the property—makes no reference to the property whatever—but is simply a promise to pay $5,000—to be void on condition that the parties to it "shall well and truly pay to Samuel L. Stephens, the sum of $2,875, and the lawful interest on that sum, and costs, in the event that the attachment suit now pending in the chancery court of said county of Green, for the collection of said sum, wherein the said Stephens is complainant and the said Green County Iron Co., is defendant, should, at the final hearing thereof, be determined in favor of said complainant; otherwise to remain in full force and virtue." Taking this bond with the return of the sheriff, both of which are made part of the record by section 3513 of the code, it must be taken to be a bond for the replevy of the property under sec. 3509, which authorizes a bond to be given at defendant's option "in double the amount of plaintiff's demand, conditioned to pay the debt, interest and costs." The question, then, is as to the liability of the parties, principal and sureties, to a decree on this bond for the debt, interest and costs. By section 3512, replevy bonds are subject to the rules presented in sec. 773 and 774 of the code. This last section is as foliows: "So, also, if any officer or any other person as hereinafter provided, who is required by law or in the course of judicial proceedings to give bond for the performance of an act, or the discharge of a duty, receives money or property upon the faith of such bond, he and his sureties are estopped to deny the validity of the bond or the legality of the proceedings under which the money or property was obtained."

Now if this bond is valid, and the proceedings under which the property was obtained, legal—and this the party is estopped to deny by the words of the section—we cannot see how the parties can escape from liability to decree on the bond. If the bond is valid, it must be a legal obligation to pay the debt, interest and costs—for these are the terms of the contract—provided the attachment suit in which it was taken should, at final hearing, be determind in favor of complainant. The fact that the defendant in this case has asserted in his answer, which is not disproved, that the iron levied on by the attachment was not his property, can make no difference, as he has given a bond by which it has been returned to his possession, and bound himself to pay the debt of complainant on condition the decree, on final hearing, should be in favor of complainant, and the validity of this bond the defendant is estopped by the statute to deny. The result is that the chancellor's decree will be reversed, and a decree entered here for complainant's debt against defendant, and against the sureties on the replevy-bond. The costs of this and court below will be paid by defendant.

NOTE.—The decision as to the validity of the replevy bond, is based upon the plain terms of a statute designed to avoid the effect of informalities in such a bond. But, without such a statute, it is probable the court might have reached the same conclusion. While a bond signed in blank is generally void at law (Wynne v. Governor, 1 Yerg. 149; Gilbert v. Anthony, 1 Yerg. 69), and so is a bond blank as to the penalty (Governor v. Porter, 4 Yerg. 192; Bumpass v. Dotson, 7 Hum. 310), yet relief will be granted in equity upon a statutory bond made payable to the wrong person (Wiser v. Blatchly, 1 Johns. Ch. 607; Armistead v. Bozman, 1 Ired. Eq. 117), or one blank as to the penalty. Bumpass v. Dotson, 7 Hum. 310. Bonds are held void at law when some defect creates a fatal uncertainty as to the precise character, extent or direction of the obligation; and equity relieves against the defect, when additional facts make that certain which at law was uncertain. The principal case, though, in a court of chancery, would perhaps be controlled, upon the point in judgment, by legal principles, inasmuch as the jurisdiction

of the Tennessee Chancery Courts is by statute concurrent with that of law courts over attachment suits against non-residents. But several decisions at law, point to the same conclusion as proper under the circumstances of the case. The bond here was taken in the suit at bar; under the statute referred to in the opinion, which says the defendant in such a suit "may always replevy the property attached, by giving bond with good security, payable to the plaintiff, in double the amount of the plaintiff's demand, or at defendant's option in double the value of the property attached, conditioned to pay the debt, interest and costs, or the value of the property attached, with interest, as the case may be, in the event he shall be cast in the suit." Code Tenn., § 3509. The bond did not recite the levy of an attachment, nor make any reference to the property itself; but it ascertained the suit, the amounts to be paid, and the event in which payment was to be made. These facts would seem to afford an opportunity for application of the maxim "*id certum est, quod reddi certum potest.*" Broom's Legal Max., p. 633. Analogous cases are found in courts of law, as follows: A bottomry-bond, payable to "Widow Moller and son," was sued on by two sons Mollers, and upon their identification as sons of Widow Moller, they recovered. Moller v. Lambert, 2 Campb. 548. In a suit on a bail-bond, wherein the payee was misnamed, the bond was nevertheless held good. Colburn v. Downes, 10 Mass. 20. And a bail-bond, made payable to the sheriff of —— county, was held good, the attendant facts of the case sufficiently designating the proper county. Payne v. Britton, 6 Randolph, 101. And where the law directs who is the payee of a bond, it is sufficient without naming him. Kincannon v. Carroll, 9 Yerg. 11. In the same case it was held, that where a word is omitted from a bond, so that the condition is insensible, if the meaning of the parties be evident, the court will supply the word. Again, a bond not naming the payee, is valid, where the law states to whom the payment should be made. Miller v. Moore, 2 Hum. 423. And where a bond is given to a corporation by a name varying from its true name, it may sue in its true name and aver the execution of the bond to it. Trustees v. Reneau, 2 Swan, 94. In a case of suit on a bond given to dissolve an attachment, where by mistake the name of the defendant had been inserted as payee, instead of that of the plantiff, it was held a valid bond. Leonard v. Speidel, 104 Mass. 356. In Kentucky, where a bond like that in the principal case, was given for the return of attached property, but the paper in fact contained no *bond proper* at all, but only the *condition* to a bond, yet in view of the facts appearing, similar to those in the principal case, it was held to be a valid bond, although, said the court, "it is unskillfully drawn, and has omitted an essential part of all penal obligations." Yocum v. Barnes, 8 B. Mon. 496. It is even allowed to the recipient of the bond to fill a blank by inserting a name, when it is done without intent to defraud, and under such circumstances, that the court itself would fill the blank as stated above. So in an action of debt on an officer's bond, where a surety showed that his name was inserted in the bond after he had signed it, and in his absence, he was held bound. Smith v. Crooker, 5 Mass. 538. And where a bail-bond was, after execution, altered by substituting the constable's name in place of the sheriff's, the liability of the surety was not thereby affected. Hale v. Russ, 1 Greenl. 334. And in Yocum v. Barnes, *supra*, the bond had been signed in blank, by all the parties to it, and delivered by them to the officers to be filled up; but the sureties were bound thereby. From these cases may fairly be deduced the rule, that any defect, informality or uncertainty in a bond, which may be relieved from or made certain by reference to the attendant and necessary circumstances of the case, will be disregarded as immaterial; the law will, in such case, treat that as certain which can by such attendant circumstances be made certain.

J. O. P

Code Practice—When Depositions may be Taken to be used Conditionally in "Suits Pending."

EX PARTE JAMES E. MUNFORD. *HABEAS CORPUS.*

Before Hon. EDWARD A. LEWIS, one of the Judges of the Supreme Court of Missouri, in Chambers, December 21, 1874.

Where a demurrer to a petition has been sustained, and leave has been given to amend the petition within a certain number of days, and the amended petition has not been filed, and the time for filing it has not elapsed, the suit is "pending" withing the meaning of the Missouri Statute which provides that "any party to a suit pending * * may obtain the deposition of any witness, to be used in such suit conditionally," A witness refusing in such a case to testify before a notary public before whom his deposition is sought to be taken, is *in contumaciam*, and may be committed to jail by the notary, and will not be discharged on *habeas corpus* until he consents to testify. [Following, as to what is a suit pending, Brown v. Foss, 16 Me. 257, and as to the power of notaries to commit contumacious witnesses, *Ex parte* McKee, 18 Mo. 599.]

LEWIS, J.—The petitioner avers that he was subpœnaed to appear before C. P. Ellerbe, a notary public, and give his deposition in a cause alleged to be pending in the St. Louis Circuit Court, wherein Alexander Turnbull and others were plaintiffs, and James E. Munford and others defendants. That upon his failure to obey the subpœna he was compelled by attachment to appear; but then declined to testify or to answer any of the questions propounded, because there was in fact no such suit pending as alleged, within the meaning of the statute which authorizes the taking of depositions. That thereupon he was committed to jail by the notary, from which incarceration he here demands to be released, upon the same ground which was the basis of his refusal to testify.

The statute provides that "any party to a suit pending in any court in this state may obtain the deposition of any witness, to be used in such suit, conditionally." 1 W. Stat. 522, §1.

It appears from the testimony that a suit was instituted in usual form in the court and between the parties above mentioned, but a demurrer to the petition, for failure to state a cause of action, and for other objections, was sustained by the circuit court. That leave was given the plaintiffs to file an amended petition within thirty days, which period has not yet expired. That no amended petition has yet been filed. It is claimed, therefore, that there is no "suit pending" within the meaning of the statute.

The argument is pressed with much ability, that there cannot be a suit without a cause of action; that a cause of action can only appear in a sufficient petition; and that, the court, having pronounced the petition insufficient, and the plaintiffs having abandoned it in obtaining leave to amend, there is, therefore, no petition in the case, and, necessarily, no suit about which testimony can be taken.

I am unable to yield to the force of these positions in the face of the law as I find it. It may have been very unwise in the legislature to open a door for the taking of testimony when neither the notary nor the witness can know what facts are to be tried. And yet almost every application of the statute abounds with such results. Our supreme court has decided that a deposition may be taken when the defendant's property has been attached and before summons served or publication made. At such a stage of proceedings it is impossible to know what facts will be denied, or whether a single word of the testimony taken will be applicable to the issues as ultimately framed. In *ex parte* McKee, 18 Mo. 599, the court comments on the impracticability of similar suggestions, where the officer "cannot know the aspect which the case will probably assume at the trial." Even if the issues are framed when the deposition is taken, they may be wholly changed before it can be used on the trial. I think the entire argument is based on an erroneous view of the policy of the statute concerning depositions. It has no reference, as I understand it, to the state of the pleadings, or any other existing condition of the cause in court. Its object is to secure testimony for the case in its *future* condition, whatever that may or may not be, at the time of trial. It is intended to guard against the contingencies of death, disease, or removal of witnesses before the trial is reached. Hence, the law only requires that the suit shall be *pending*. The institution of the suit is the only guaranty demanded of the plaintiff's earnestness. He may then *take* the deposition. But every question of its necessity or admissibility, for whatever reason, is specially reserved for the trial court to pass upon at the proper time. Formerly, the statute authorizing depositions stipulated, as a prerequisite, that the testimony should be "necessary" in the cause. But in 1835 this condition was stricken out, and from thence hitherto nothing has been required but that a suit should be pending.

These considerations leave us no excuse for attempting to strain the words of the statute aside from their plain, literal meaning. What is a "suit?" Whatever it may have been formerly, it is now, according to Chief Justice Marshall, understood to be "the

prosecution of some demand in a court of justice." Here Turnbull and others, plaintiffs, came into the circuit court with a demand against the defendants. Have they failed to prosecute it? By no means? When told by the court that the *form* in which it was presented was insufficient to be entertained, they did not go out of court, or abandon their demand, but at once proposed to follow it up in an amended petition. The court told them they might do this at any time within thirty days. Surely they could lose no advantage by taking the court at its word. They rightly considered themselves still in court, prosecuting their demand and failing in nothing until the thirty days should expire without an amended petition filed. Their *suit* is in court, whatever may be said of the original petition, and whether this is abandoned or otherwise.

The history of every suit is comprehended in three stages: its institution, its pendency and its determination. When once instituted it is thenceforward pending, in every instant of time, until finally disposed of. As expressed by the Superior Court of New Hampshire, the term "pending" means nothing more than "remaining undecided." In Maine, where the statute is similar to ours, it was held that a case was "pending" so as to authorize the taking of depositions, even where a nonsuit had been entered, but with leave to have it taken off if the plaintiff would appear on the first day of the succeeding term. Said the court: "The suit must be regarded as pending from its first institution until its final termination. Brown v. Foss, 16 Me. 257.

I find no escape from the conclusion that the suit of Turnbull and Others v. Munford and Others was pending, literally and within the meaning of the statute, when the notary sought to take the petitioner's deposition. The latter complains that the only object is to elicit facts from which to make a case against him. If this be so, it is a peril against which neither the constitution nor the statute has undertaken to protect him. It is well understood that a witness can never refuse to testify, on the ground that his testimony may render him liable to a civil action. In this case the witness is certainly no worse off than he would be if a petition were on file, legally sufficient on its face, and yet, in his estimation, untrue and fictitious in all its allegations. Would he claim, in the latter case, that the truth of the petition must first be established in order to authorize the taking of his deposition for the very purpose of establishing the same thing? Every man's knowledge of facts which may be material to the administration of justice, is, subject to certain exceptions of personal privilege, the absolute property of the law, and may be demanded of him under the forms prescribed without any reference to his convenience or his profit or loss.

As to all other matters of enquiry in this proceeding, I consider them settled by the opinion of our supreme court in *ex parte* McKee, 18 Mo. Rep. 599. After quoting from the several statutes relating to *habeas corpus*, witnesses and depositions, Judge Gamble proceeds to say: "A notary public, then, being authorized to take depositions, and having the same powers for that purpose as are conferred on justices of the peace, may summon a witness before him, and enforce his attendance, if he fails to attend; and if he attends and refuses to give evidence which may lawfully be required to be given, the notary may commit him to prison until he gives the evidence." As to what evidence "may lawfully be required" on such occasions, the court declares this to embrace every question "which it is not his *personal privilege* to refuse to answer." It is not claimed in this case, as it was not in that, that any question of personal privilege is involved. The court, in that case, refused to issue the writ.

Upon the authority of that decision, I might have refused to issue the writ in the present case, but for the allegation in the petition that "no such cause was pending as alleged." Taking that allegation as true for the purpose intended, I was disposed to construe every doubt in favor of the liberty of the citizen, and so, not to apply Judge Gamble's opinion to a case in which the notary had never acquired any jurisdiction of the subject matter. He is an officer of strictly defined powers, and cannot take a deposition at all, unless there be a suit actually pending in some court. But I find the allegation on that point disproved by the testimony, and hence, have no recourse left me but to remand the petitioner whence he came.

PRISONER REMANDED.

Accommodation Endorsement by Cashier.

WEST ST. LOUIS SAVINGS BANK v. SHAWNEE COUNTY BANK AND G. F. PARMELEE.

U. S. Circuit Court, District of Kansas, November Term, 1874.

Before DILLON and FOSTER, JJ.

A cashier without special authority cannot bind his bank by an *official* endorsement of his individual note, and the *onus* is on the payee to show the cashier's authority.

The defendant, Parmelee, made his *individual note payable to the order of the plaintiff*, and indorsed it, "G. F. Parmelee, Cashier," and gave the plaintiff as collateral security a certificate of stock in the Shawnee county bank, issued to and owned by him (Parmelee). The consideration of the note was a loan of money by the plaintiff to Parmelee; who at the time of obtaining the loan advised the plaintiff that he intended to use the money borrowed to pay for the stock he had subscribed for in the Shawnee county bank.

The defendant, Parmelee, has failed to pay the note, and the question in the case is whether the Shawnee county bank is liable on the indorsement of the cashier above mentioned.

Ennis & Foster for the plaintiff; *Guthrie & Brown* for the Shawnee county bank.

DILLON, Circuit Judge:—The form of the note as well as the evidence *aliunde* shows that the plaintiff made the loan to the defendant, Parmelee, who gave his own note for the amount and pledged his own stock as security. The note was indorsed by him thus: "G. F. Parmelee, cashier." It is established by the proof that the directors of the defendant bank did not know of this indorsement and never ratified it.

The defendant bank did not receive the proceeds of the discount of the note of Parmelee except in payment of his stock. Under these circumstances we are clear in the opinion that Mr. Parmelee's indorsement of the note as cashier of the defendant bank, did not bind it. The plaintiff had notice of the presumptive want of authority of Parmelee, both by the form of the instrument (Lemoine v. Bank of North America, 1 CENTRAL LAW JOURNAL, 529, and cases there cited), and the facts of the transaction of the loan to him. The cashier of a bank has no implied authority to *indorse officially* his individual note, thus by his own act making the bank an accommodation indorser for his own benefit. As this was done in this instance, the plaintiff bank had notice of it, and to hold the defendant bank on such indorsement, the *onus* to show authority, express or implied, from the directors of the defendant bank, is upon the plaintiff. It has failed to establish such authority. On the other hand the defendant bank has affirmatively established that the cashier had no such authority. The suit must be dismissed as to the defendant bank. The plaintiff is entitled to a decree against the defendant, Parmelee, for the amount of the note and for a sale of the collateral.

FOSTER, J. concurs. DECREE ACCORDIGLY.

NOTE.—*Notice to director when notice to the bank.*—The leading cases on this subject are collected and well commented on in Morse on Banks and Banking, 108 *et seq.*, where the author expresses the rule (Ib. p. 111), in this language: "Whatever knowledge a director acquires *within the scope of his official* employment, he is bound to communicate to his co-directors, that is to say, to the bank itself."

The case of the Bank of the United States v. Davis, 2 Hill (N. Y.), 451, as one in which a bill of exchange was sent to a bank director with the request

to procure a discount upon it. This director, at the director's meeting in in which he participated, falsely asserted that the discount was for himself, and he received the proceeds of it, and it was held that the bank was affected through the director with knowledge and could not recover the amount of the bill from the party defrauded.

Knowledge possessed by a director, who was also one of the trustees of bonds assigned to innocent third person, does not charge the latter with the knowledge of the director who only nominally represents them. Curtis v. Leavitt, 15 N. Y. 9.

When notice to the president is notice to the bank, see Porter v. Bank of Rutland, 19 Verm. 410.

"*Corporations having common officials* are not," says Mr. Brice in his treatise on Ultra Vires, 350 (Eng. Ed.), "necessarily affected through these with a knowledge of each other's transactions." He cites Re Marseilles Railway Co. etc., *Law Rep.* 7 Ch. 161; Re European Bank, *Law Rep.* 5 Ch. 850. Compare Re Contract Corp. etc. *Law Rep.* 8 Eq. 14: Gray v. Lewis, Ib. 526.

[Correspondence.]

The Death of a Human Being as a Cause of Action.

EDITORS CENTRAL LAW JOURNAL—The interest this question is now exciting, and the attention you are giving the question, is my apology for referring your readers to a decision of the Supreme Court of Georgia, made in 1854, in the case of Shields v. Yonge, Supt., etc., 15 Ga. 349. That was a suit brought by a father against a railroad, alleging the death of his son, aged 18 years, caused by the negligence of the employees of the road, and claiming damages for the loss of services of the deceased. Defendant demurred to the action. The demurrer was sustained by court below, and case carried to the supreme court, where the ruling of the court below was reversed, on the ground that the homicide was of such a grade as not to amount to a felony, but only to a misdemeanor, and that in case of misdemeanor, the private injury was neither merged in the public, nor suspended until the public prosecution should be ended.

The court say, Judge Benning delivering the opinion: "I must say, therefore, that Lord Ellenborough's unsupported *nisi prius* declaration, that "in a civil court the death of a human being could not be complained of as an injury," opposed as it is to the expressed opinion of Comyn, (Comyn's Digest Trespass, b. 5); to the plainly to be implied opinion of Blackstone (4 Bl. Com. 6); from every inference from analogy, to the maxim, that when the reason is the same, the law is the same, seems to me to be too broad.

The case is well discussed, and will repay looking over.

E. N. BROYLES.

Atlanta, Ga., December 14, 1874.

Notes and Queries.

1. FALSUS IN UNO, FALSUS IN OMNIBUS.

ERIE, KAN., December 14th, 1874.

EDITORS CENTRAL LAW JOURNAL:—Your correspondent, "A. B.," in the JOURNAL of December 11th, having read a syllabus of the case of Gannon v. Stevens, recently decided by the Supreme Court of Kansas, says that the maxim, "*falsus in uno, falsus in omnibus*," was not considered or applied in that case, as I stated in my note published in No. 48 of the JOURNAL.

It is but just to myself to say that since writing the note referred to I have obtained a certified copy of the opinion, and find that the question was not only passed upon by the court, but was the main point urged in the brief of counsel.

"A. B." says "*we* deem it but just to the Supreme Court to briefly state its decisions on the principle of law in question in former cases," and after referring approvingly to the cases of Campbell v. The State (3 Kansas, 488), and The State v. Horne (9 Kansas, 131), he proceeds: "This proposition" (substantially the proposition embraced in the instruction quoted in my note, *ante*, p. 599) "is in harmony with the majority of decided cases, and with the fundamental principles of the law of evidence. In fact the cases cited by him (referring to the cases cited in my note) support the above rule *in toto*, and *do not conflict with the decisions of the Supreme Court of Kansas so far as reported*."

Now, inasmuch as the learned Judge who delivered the opinion in the case of Gannon v. Stevens, cites the same cases (which one also cited in counsel's brief) as being *in conflict* with the doctrine of Campbell v. The State, and expressly declares in favor of overruling the last named case, I will employ his words to answer the startling proposition of "A. B."

I quote *verbatim* from a certified copy of Judge Valentine's opinion in Gannon v. Stevens, to-wit:

"The application of the maxim, *falsus in uno, falsus in omnibus*, was a proper application of that maxim according to the decisions of this court. Campell v. The State, 3 Kansas, 488; State v. Horne, 9 Kansas, 131. Although in the opinion of the writer of this opinion it is unfortunate that such decisions were ever made, and they should be overruled. Mead v. McGrow, 19 Ohio St., 55, and cases there cited; Poulette v. Brown, 40 Mo. 52, 57, *et seq.*, and cases there cited; Blanchard v. Pratt, 37 Ill., 243, 246; Callahan v. Shaw, 24 Iowa, 441, 447. I shall certainly never be in favor of reversing a judgment of the district court for *refusing* to give such an instruction as the one given in this case. The instruction referred to is as follows: 'If in your examination of the testimony in this case, you should be satisfied that any witness has testified falsely and corruptly in reference to any material fact, you should disregard the whole of the testimony of such witness.'"

The fact that the case of Wood v. M. K. & T. R'y., referred to by "A. B.," does not even contain a mention of the principle under discussion, together with his statement that Mead v. McGrow, 19 Ohio St. 55, is in harmony with Campbell v. The State, 3 Kansas, 488, would suggest that your correspondent is a writer "of infinite jest."

SCIENCE OF THE LAW.

II. FALSUS IN UNO, FALSUS IN OMNIBUS.

EDITORS CENTRAL LAW JOURNAL:—In No. 50, of your journal, "A. B.," a correspondent, defends the opinion of the Supreme Court of Kansas, in State v. Horn, 9 Kas. 131, wherein the court hold that it is proper to instruct a jury "That, if they believe a witness has knowingly and willfully testified falsely in respect to a material fact in the case, they *must* disregard the whole of such witness, testimony," which "A. B." approves as "sound law" and "which will be found in harmony with the majority of decided cases, and with the fundamental principles of the law of evidence." We take issue with "A. B." Such an instruction is not sustained by a majority of decided cases, nor consistents with the principles of the law of evidence. If a competent witness is introduced and testifies, the jury are the sole judges of his credibility, and of the right to be given to the whole, or any part of his testimony, under the general rules and instructions of the court. The foregoing proposition no one doubts. If it is the province of the jury to judge of the credibility of the testimony, and of the court to furnish only general rules for their guidance, it would be erroneous for the court to direct them to disregard the whole or any part of the testimony in the case.

A witness may, knowingly and willfully, swear falsely to one material fact and truthfully to many other material facts; in that case, if the Kansas rule be the correct one, the court would instruct the jury to disbelieve the witness in regard to matters about which he has testified truthfully.

Falsus in uno, falsus in omnibus, is a maxim that is, in common law trials, to be applied by the jury, according to their own judgment, for the ascertainment of the truth, and is not a rule of law in virtue of which the judge may withdraw the evidence from their consideration, or direct them to disregard it altogether. State v. Williams, 2 Jones N. C. 257; 19th Ohio St. 55; also the rule in Missouri. "The maxim does not operate to preclude the jury from believing the witness, if they choose to do so." See Mercer v. Wright, 3 Wisc. 645; Knowles v. People, 15 Mich. 411; Lewis v. Hodgdon, 17 Maine, 267; 1 Taylor's Evidence, § 171.

An instruction that gives the jury the liberty, if they see proper, to disregard or reject the entire testimony of a witness who has knowingly and willfully sworn falsely to a material fact in issue, would be proper, and leave the consideration of all the matters in relation thereto with the jury, where it properly belongs; but, if the court directs the jury that, if they believe the witness has knowingly testified falsely to a material fact in the issue, they *must* disregard his entire testimony, the maxim is then treated as a rule of law by which the judge withdraws the evidence from their further consideration, and prevents their believing the witness in matters they may think he testified truthfully about, and for that reason such an instruction is erroneous.

Respectfully, &c., O. H. BARKER.

III. SALE OF PERSONAL PROPERTY—REPLEVIN.

EDITORS CENTRAL LAW JOURNAL:—A. sold to B. 200 bushels oats for 30cts. per bushel, B. paying cash at time of sale, and taking a due-bill in these words: Due B. 200 bushels oats. Signed A., August 20th, 18/4. A bulk of oats in A.'s wareroom, of perhaps about the quantity, was shown to B. by A., A saying, you can take them away at your pleasure,

B. took away a part of the oats, but before he removed them all, A. made an assignment of his effects for the benefit of his creditors, and the residue of the oats went into the hands of his assignee.

B. brings replevin to recover the oats. Did the sale of the oats by A. to B. pass the title? P.

ANSWER.—We suppose there is no doubt whatever of the right of B to recover in the action of replevin. This is not a controversy between a purchaser of personal property to whom it has not been delivered and a *subsequent* creditor or purchaser without notice of the sale. A's assignee can, therefore, have no higher right to the oats than A. had, which was no right at all; and if he is fully apprised of the facts it is a knavish piece of business in him to attempt to assert title to them. We do not refer to authorities, because we take it that the case as stated, is too plain for doubt.

IV. REMEDY OF ASSIGNEE OF LAND AGAINST RAILROAD COMPANY FOR FAILURE TO FENCE TRACK.

KIRKSVILLE, MO.

EDITORS CENTRAL LAW JOURNAL:—Please answer with brief through the columns of your valuable paper, the following question:

A. conveys to a railroad company, the right of way through certain lands, and in the deed is the following condition:

"And this grant is upon the express condition that said railroad company, shall erect and maintain in good repair, a good and substantial board fence upon each side of said road, as soon as the road is put in operation through said land, and upon the failure of said company to erect and maintain said fence, this deed shall be void."

The company fail to erect the fences, etc. After a breach of the condition, A. sells the land, including that over which the road runs, to B. Has B. any remedy against the R. R. Co., and if so, what is it? ADAIR.

ANSWER.—This is a covenant which runs with the land. 1 Smith Lead. Cas. *124. *139. The Prior's Case, Co. Litt. 384 b; Savage v. Mason, 3 Cush. 318; Woodruff v. Trenton Water Power Co., 2 Stockton Ch. (N. J.) 189; Sharp v. Waterhouse, 7 Ellis & Blackburn, 816, 823. B. therefore has the same remedies against the railroad company which A. had. What these remedies are, was stated by Wagner, J., in Baker v. Chicago &c R. R. Co., 1 Cent. L. J., 506: "He may bring his bill for specific performance, and he may recover damages; or he may proceed to build the fences * * and compel the company to pay therefor."

V. RIGHTS OF PURCHASER WHO HOLDS UNDER TITLE BOND AGAINST VENDOR'S MORTGAGEE.

FALLS CITY, NEB.

EDITORS CENTRAL LAW JOURNAL—Two years ago A. bargained with B. for a tract of land, paid him part, gave notes for the balance, the last one payable in 1876, and took from B. a bond for a deed, which was properly recorded. Since that time B. has mortgaged the same tract to C. The mortgage is due and B. is unable to pay it. C. proposes to foreclose. What remedy has A? This case is laid in Kansas. It is claimed by some that the bond is only a personal contract, by others, that it gives him a lien on the real estate. Yours truly, J. M. C.

ANSWER.—If the local statutes of the state authorize bonds for deeds to be recorded, and if this was so recorded as to be constructive notice, then the mortgagee would be bound to take notice of A's rights under his title-bond. And so if the mortgagee had actual notice of A's purchase. In either case, A. would in equity be the owner of the land, subject to the obligation to pay the purchase-money. If the mortgage is sought to be foreclosed, A. can be made a party and set up his equities, the extent of which would depend upon the registry statutes and the circumstances of the particular case. J. F. D.

Briefs.

Letter from Hon. Chas. W. Adams, with a List of Briefs.—Our column devoted to the notice and exchange of briefs promises to be a feature of much interest. The following letter from Hon. Charles W. Adams, one of the foremost lawyers of the South, sets out in appropriate terms the advantages which may be expected to accrue from an exchange of such courtesies among the members of the profession:

EDITORS CENTRAL LAW JOURNAL: Nothing in your journal presents to mind a wider field for *real benefit* to the profession, than your article, "Exchange of Briefs." Not only will this be a medium of exchange of legal ideas, but will beget a *national* professional courtesy, the value of which is incalculable. This government has always looked, must always look, to its judges and lawyers for its guidance in all matters of its highest interest as a government, and for the settlement of all rights, save those of which the sword *must* be the arbiter; and oftentimes to shield the country from that. These, therefore, for the good of all, *should be* in accord and harmony. For this the *peculiarities of each section* should be familiar to *all*. In no way may this knowledge, this familiarity, be as exactly, as forcibly presented, as by the exposition of questions arising in our courts. Bankers and merchants control dollars and goods; physicians, sanitary matters; mechanics, physical utility and public ornamentation; lawyers, the nation, and ALL interests. As far as possible *they* should be as one man, socially and professionally; and all work assiduously, to *perpetuate our liberties as a people*.

Should any of your correspondents desire to have them, I now have printed briefs (a few of each) for the Supreme Court of Arkansas, as to, 1st, the power of a county court to contract and levy taxes to pay for public buildings; and, thereupon, the power of a court of chancery to enjoin the collection of the tax.

2. The power of one (a majority in interest) partner to control partnership assets.

3. The validity of a mortgage upon a crop *to be planted*.

In the Supreme Court of Mississippi:

6. As to the right of a married woman to bind her separate property under a deed to a trustee, giving *her* full use of the property, save by *way of anticipation*. The effect of a contract during the late war, on one side, and supplies sent thereunder to the other side of the line of military occupation; and the statute of limitations of that state.

In the Supreme Court of Tennessee:

As to fraud in a conveyance by husband for benefit of wife, before the war, and the insolvency of the firm of which *he* was a member, during the war. In which is reviewed at length, the cases of Read and Livingston, and those cases following that. Also, a written opinion as to the question, whether *perjury* committed in a federal court, is the subject of indictment in a state court. Also, as to *what* is indictable under the 5th section of the enforcement act. I am willing to cast in my might for the general good

Yours truly, CHAS. W. ADAMS.

Usurpation of Office—Quo Warranto under Illinois Statutes.—People *ex rel.* Jones v. Beach, Supreme Court of Illinois, Central Grand Division. Brief for the relator. Jones was ejected from the office of Master in Chancery of Logan county, Illinois, by the appointee of an incoming judge, and brings a proceeding in the nature of a *quo warranto* to eject the intruder. The main question is, whether the term of office of the relator had expired at the time he was ejected. The nature of the remedy by information in the nature of a *quo warranto*, is also discussed, including the right of the people to relief, now that the term has expired. [Address William B. Jones, Esq., Lincoln, Ill.]

Right of Women to Vote at Election for Federal Officers.—Virginia L. Minor *et al.* v. Happersett, Supreme Court of the United States. Mrs. Minor applied to Happersett, who was an officer for the registration of voters, to be registered as a voter, and, being refused, brings this action for damages. A demurrer to the petition was sustained by the Supreme Court of Missouri, and this is a writ of error to that decision. The brief before us is an able argument, by Francis Minor, Esq., husband of the plaintiff in error, in favor of her right to vote under the constitution of the United States. The case will be argued in February. [Address Francis Minor, counsellor at law, St. Louis, Mo.]

Can a Circuit Judge Enlarge a Prisoner under the Writ of Habeas Corpus, who is under Sentence by a Void Judgment of the Supreme Court?—*Ex parte* Madison Teat, before Hon. E. S. Fisher, a judge of the Circuit Court of Mississippi, on petition for writ of *habeas corpus*. The defendant in this case was twice convicted of murder in the first degree, in the circuit court, and twice in the supreme court, and was three times respited by the governor. Four gallows have been erected for his execution, and two coffins prepared at public expense. Twice he has started for the gallows and has been twice met by the governor's respite; and yet he is not happy. The pamphlet before us is a forcible, and, in many passages, an eloquent attempt to show that a circuit judge in Mississippi may, under the writ of *habeas corpus*, enlarge a prisoner who has been sentenced to death by the supreme court of the state, if the judgment of that tribunal is void for want of jurisdiction. Judge Fisher, who, by the way, is an able judge, and was, before the war, a judge of the High Court of Mississippi, decided against the application. A respite, was, however, obtained from the governor, and a writ of error *coram nobis*, was granted by the supreme court, under which its former proceedings in the case have been set aside, and the case is again docketed for hearing in that court. [Address Col. D. A. Holman, Winona, Miss.]

*** Several briefs stand over to be noticed hereafter.

Book Notice.

ROSCOE'S DIGEST OF THE LAW OF EVIDENCE IN CRIMINAL CASES. By HORACE SMITH, Esq., B. A., of the Inner Temple and Midland Circuit, Barrister at Law. Seventh American, from the Eighth London Edition, with Notes and References to American Cases. By Hon. GEORGE SHARSWOOD, LL. D. Philadelphia: T. & J. W. Johnson & Co. 1874. Sold by Soule, Thomas & Wentworth, Saint Louis.

The author of this work was the son of Roscoe, the historian, and was the author of several other law books. This book is what it purports to be, a digest. No attempt is made at the development of principles. The success which has attended it, however, is a conclusive proof that an accurate index to what the courts have decided, and what the legislature has enacted, is the highest merit of a law book. It is an exceedingly useful compendium of the English decisions on the law of criminal evidence, and of the English statutes relating to crimes and criminal procedure.

The notes of the American editor are very few, compared with what might be expected in a work of this character. They consist of the briefest possible statement of decided points, packed together without paragraphing or catch-words, and without any attempt at order or regularity that we can perceive. Thus, on page 100, in a note to a section relating to evidence of the character of the prisoner, we find two cases sandwiched in, which relate to character of the deceased for violence in trials for homicide. There are, perhaps, twenty American cases on this subject, and these should have been collected.

The success which has attended this work in America, would seem to justify the labor which would be necessary to the preparation of a *good* American edition of it. To attain this end, the text should be attacked with an unsparing, but judicious hand. All English statutes and other matters, which can have no application to this country, should be vigorously lopped away, and the index should not be permitted to exhibit such titles as "Deer-Keepers;" "East Indies;" "Exchequer Bills;" "India;" "Ireland;" "Poachers;" "Rabbits;" "Separatists;" "Superintendent Registrar;" "Vexatious Indictment Acts," etc. The American notes should be extended so as to constitute at least one-half the matter in the volume, and should be moulded into subdivisions and prefixed by catch-words to facilitate reference, and the cases collected in the notes should appear in the table of cases. They do not so appear in this edition.

Still, the notes contain, in small space, a great many references; and the work is no doubt of much value to the criminal judge or practitioner.

*** Books received for notice hereafter:

Benjamin on Sales, 2d Edition. New York: Hurd & Houghton. Cambridge: Riverside Press.

Summary of our Legal Exchanges.

WEEKLY NOTES OF CASES (PHILADELPHIA, KAY & BRO.), DEC. 1.

[NOTE.—The following case is reprinted from the Weekly Notes, without condensation.]

Distribution of Fund under Corporation Mortgage Act of 11th April, 1862 (Purdon, 593)—Preference among Creditors—Rights of Bondholders—Payment, when Presumed.—Patterson v. Hempfield R. R. Co., Supreme Court of Pennsylvania at *nisi prius*. [1 Weekly Notes, 127.]

This case came up on exceptions to the Masters' report.

The Hempfield Railroad Company was incorporated in 1850. Acts of 15th May, 1850, and April 12, 1851, P. L., 1851, pp. 862 and 4. In 1855, coupon bonds were issued to raise money to build the road, and to secure their payment, a mortgage was made to certain trustees. If coupons were not paid, then, by this deed, the trustees were to take possession of the road for six months, and out of the profits, to pay said bondholders. An authority was also given by the deed to trustees to contract debts for "preserving, repairing and maintaining" said road. In 1856, the company, by deed, delivered possession to the trustees for six months, and in 1857, by a second deed, continued the possession until bonds should be paid. The trustees contracted debts to large amount for work done and materials furnished, and also completed the road by laying down rails after road-bed had already been constructed by company. For iron for these rails, trustees contracted with one Whitaker, who was paid part cash, and for the remainder, received bonds of company, subject to right to redeem at par in one year.

In 1860, one Patterson filed a bill against the company and trustees to compel a sale under the act of 11th April, 1862 (Purdon, 593, pl. 11), which was finally made, and a master appointed to distribute the fund arising therefrom. The master reported in favor of those creditors whose claims had arisen during trustees' possession, excluding the bondholders and creditors, whose debts were contracted before the delivery of the road to the trustees under the deed. The master also found that Whitaker's claim had been satisfied by receiving payment in bonds.

To this report the bondholders and Whitaker excepted.

Burgwin (of Pittsburg), for bondholders. Under the mortgage deed, the trustees had no power to extend the road, or to contract debts therefor, but only to preserve, repair and maintain. The deed of 1857 was invalid as giving trustees indefinite possession.

P. McCall, for exceptant, Whitaker. The right to redeem the bonds taken by Whitaker, stamped them as a collateral security only for a still existing debt, which might be sued for in a common law court. The bonds were not to be considered as taken in payment. 1. Because they were the bonds of the debtor, and not of a third party; and, 2. Presumption of payment in such case is a mere presumption, which may be rebutted, as is done by the evidence here.

Willson (with whom was *Bradon*), sustaining report. The extension of road was necessary to the value of the franchise, and therefore came within authority to *preserve* and *maintain*. The trustees represented the bondholders for whose benefit the expenditure had been made. We claim that trustees had power, under their general duty, to contract debts for this purpose.

C. A. V.

Dec. 22. Sharswood, J., dismissed the exceptions, except those of Whitaker, and ordered a distribution, charging his claim upon the fund.

LEGAL GAZETTE, DEC. 11.

Overdue note Payable to Bearer—Defence against—Burden of Proof—Bonds Emitted by a State for Treasonable Purposes—Endorsement of Governor.—National Bank of Washington v. Texas, Supreme Court of the United States, October Term, 1873. [6 Leg. Gaz. 393.]

1. A note payable to bearer, though overdue and dishonored, passes by delivery the legal title to the holder, subject to such equities as may be asserted by reason of its dishonor.

2. Any one disputing the title of the holder of such paper, takes the burden of establishing, by sufficient evidence, the facts necessary to defeat it.

3. There is no competent evidence in this chancery suit that the bonds in controversy, which were issued by the United States to the state of Texas, though overdue when they passed from the treasury of the state, were issued by the state, or received by the person to whom they were delivered, for any treasonable or other unlawful purpose.

4. The absence of the endorsement of the governor of the state on the bonds, does not raise a presumption of such unlawful purpose, under the circumstances of this case.

5. The cases of Texas v. White and Chiles, 7 Wallace, 718; Same v. Hardenberg, 10 Id. 68; and Same v. Huntington, 16 Id. 402, considered, and their true result ascertained and applied to the present case.

MONTHLY WESTERN JURIST (BLOOMINGTON, ILL.), FOR JANUARY.

Negligence—Municipal Corporations—Defective Sidewalk—Snow and Ice—Contributory Negligence—Evidence.—Perkins v. The City of Fond du Lac, Supreme Court of Wisconsin, opinion by Cole, J. [1 Mon. West. Jur., 410.]

1. In an action for an injury to plaintiff's person, alleged to have been caused by the defective condition of a public walk in the defendant city, it appeared that plaintiff, on his way to a railroad depot, passed westward along the *south* side of a certain street until he reached a bridge connecting the east and west portions of said street; that after crossing the bridge, he *passed over to the north side* of said street, and, in descending from the bridge to the sidewalk, along a plank walk which descended about two and a half feet in twenty, he fell and was injured; that it was a bright star-light evening in winter, with snow upon the ground; that plaintiff had in one hand a satchel and in the other books; that there were strips nailed across said descending walk, but these were entirely covered with packed snow and ice, and the whole surface of the walk was smooth and slippery. It also appeared that plaintiff had been on the walk frequently, and knew that it was an inclined plane at this point; but there was no evidence that he knew of its peculiarly slippery and dangerous condition at that time. It was one of the principal walks of the city, over which hundreds of persons were daily passing. There was a less descent from the bridge to the sidewalk on the *south* side of the street; and the middle of the street was planked. *Held*, that upon these facts the court did not err in *refusing to instruct* the jury, as a proposition of law, that plaintiff was *guilty of negligence* in descending upon this walk to the north side of the street; but that question was properly *left to the jury*.

2. The *mere slippery condition* of a sidewalk, arising from the ordinary action of the elements (as snow and ice), is not a defect which renders the town

or city liable under the statute (Cook v. Milwaukee, 24 Wis. 270, and 27 Id. 191); but if the walk is in other respects unskilfully or improperly built, so as unnecessarily to increase the danger of persons walking thereon while it is covered with snow and ice, this will render it defective or insufficient within the meaning of the statute.

3. *Evidence for the defendant* city, "that there were a great number of bridges in the city that were built higher than the street, and that nearly all the approaches to these bridges were raised," was properly rejected as *irrelevent to the issue.*

WASHINGTON LAW REPORTER, JANUARY 5.

Landlord's Lien for Rent in the District of Columbia, and his Remedy Therefor.—Joyce v. Wilkenning, Supreme Court, District of Columbia, General Term [1 Wash. Law Rep. 357.] 1. A landlord can claim the lien conferred by the act of Congress of February 22, 1867, for rent due and in arrear, and also for any installment of rent, although the tenant has occupied the premises only for a part of the time during which said installment is accruing.

2. Where the lease is for a period of several years, and the rent is payable monthly, and the tenant is about to remove his goods and chattels from the leased premises, the landlord may issue his attachment under said act, and serve it on said chattels for rent in arrear, and for rent which will be due and payable for the month, during a part of which the tenant occupied the premises.

3. The lease was for a term of five years, at the annual rent of $1,200, payable in monthly installments of $100. The tenant threatened to quit the premises after being in possession a few months, having paid all the rent due for the portion of time he occupied the premises, and it was held that a bill in equity to enforce the landlord's lien, by attaching all the goods and chattels of the tenant, in order to secure or pay the whole of the rent for the entire term of the lease, could not be maintained.

CHICAGO LEGAL NEWS, DECEMBER 26.

What Constitutes a Navigable River.—The United States v. The Steamboat Monticello; Supreme Court of the United States, October term, 1874. Opinion by Mr. Justice Davis. 7 Chi. Leg. News, 105. This is an exceedingly interesting opinion on a question which has frequently been before the courts, and as to which legislatures have been appealed to in many cases. There are probably twenty acts in the session laws of Tennessee alternately declaring the Hatchie river navigable and notn avigable. The Fox river, in Wisconsin, although a small stream, and broken by rapids in several places, has, from the earliest history, constituted a highway of great value between the Mississipp iriver and the great lakes. Mr. Justice Davis states the previous rulings of court on the question, what constitutes a navigable river, as follows:

"This court held in the case of the Daniel Ball (10 Wallace) that those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And a river is navigable water of the United States when it forms by itself, or by its connection with other waters, a continued highway over which commerce is, or may be, carried with other states or foreign countries in the customary modes in which such commerce is conducted by water. 11 Wallace, The Montello. Apply these tests to the case in hand, and we think the question must be answered in the affirmative."

He then gives an interesting geographical and historical account of the stream and the mode in which commerce has been carried on upon it. He then says:

"The true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of the country, over which rafts of lumber of great value are constantly taken to market. It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce, affords the true criterion of the navigability of a river, rather than extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischevious rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said (21 Pick. 344): "Every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture."

The following cases are cited as supporting the views here presented: Moore v. Sanborn, 2 Michigan, 519; Brown v. Chadbourne, 31 Maine, 1; People v. Canal Appraisers, 33 New York, 461; Morgan v. King, 35 New York, 459; Flaanagan v. Philadelphia, 42 Pennsylvania, 219; Monongahela Bridge Co. v. Kirk, 46 Pennsylvania, 112; Cox v. The State, 3 Blackford, 193; Hogg v. Zanesville Canal Co., 5th Ohio, 410; Hickok v. Hine, 23 Ohio State, 527; Jolly v. Terre Haute Bridge Co., 6th McLean, 237; Rowe v. The Granite Bridge Co., 21 Pickering, 346; Ills. River Packet Co. v. Peoria Bridge Co., 38 Illinois, 467; Harrington v. Edwards, 17 Wisconsin, 586.

Liability of a Carrier for Wrecking a Barge upon a Bridge Pier During Tempestuous Weather.—The Steamboat Mollie Mohler v. The Home Insurance Company, same court, opinion by Mr. Justice Davis. [7 Chi. Leg. News, 105.] The appellee was the insurer of a cargo of wheat shipped on a barge appurtenant to the steamer Mollie Mohler, on the 12th of May, 1866, at Mankato, in the Minnesota river, in the state of Minnesota, and destined to St. Paul, on the Mississippi. The barge was wrecked by collision with a bridge pier just above the city of St. Paul, and the cargo became a total loss. This loss the insurance company paid, and filed this libel to recover the amount under its right of subrogation. The defence was that the loss was occasioned through a peril of navigation, which was one of the exceptions contained in the bill of lading. But the court, upon an examination of the testimony, hold that it was negligence in the master of the steamboat to attempt the passage of the bridge in the state of weather then prevailing, and that the defence must hence fail. The learned justice said that "the general doctrine, that a carrier is not answerable for goods lost by tempest, has no application to such a case." And in concluding the opinion, he uses the following language:

"The officers of steamers plying the western waters must be held to the full measure of responsibility in navigating streams where bridges are built across them. These bridges, supported by piers, of necessity increase the dangers of navigation, and river men, instead of recognizing them as lawful structures built in the interest of commerce, seem to regard them as obstructions to it, and apparently act on the belief that frequent accidents will cause their removal. There is no foundation for this belief. Instead of the present bridges being abandoned, more will be construeted. The changed condition of the country, produced by the building of railroads, has caused the great inland waters to be spanned by bridges. These bridges are, to a certain extent, impediments in the way of navigation, but railways are highways of commerce as well as rivers, and would fail of accomplishing one of the main objects for which they were created—the rapid transit of persons and property—if rivers could not be bridged. It is the interest as well as the duty of all persons engaged in business on the water routes of transportation, to conform to this necessity of commerce. If they do this and recognize railroad bridges as an accomplished fact in the history of the country, there will be less loss of life and property, and fewer complaints of the difficulties of navigation at the places where these bridges are built. If they pursue a different and contrary course, it rests with the courts of the country, in every proper case, to remind them of their legal responsibility."

A Woman Cannot be a Justice of the Peace in Maine.—Opinion of the Supreme Judicial Court of Maine certified to the governor.

On the 6th of February last, the governor and council of Maine requested the opinion of the Supreme Judicial Court of that state on the following question:

First—Under the constitution and laws of this state, can a woman, if duly appointed and qualified as a justice of the peace, legally perform all acts pertaining to such office?

Second—Would it be competent for the legislature to authorize the appointment of a married or unmarried woman to the office of justice of the peace; or to administer oaths, take acknowledgment of deeds or solemnize marriage, so that the same shall be legal and valid?

These questions the court, after stating their reasons at some length, answer as follows:

"To the first question proposed, we answer in the negative.

"To the second, we answer that it is competent for the legislature to authorize the appointment of a married or unmarried woman to administer oaths, take acknowledgement of deeds or solemnize marriages, so that the same shall be legal and valid."

In this opinion five of the judges, Appleton, Ch. J., and Cutting, Danforth, Peters and Virgin, JJ., concurred. Walton and Burroughs, JJ., unite in a dissenting opinion; and Judge Dickerson presents his views in a separate dissenting opinion.

The majority of the court enforce their views by the following reasoning:

"By the constitution of Massachusetts, of which we formerly constituted a portion, the entire political power of that commonwealth was vested, under certain condition, in its male inhabitants of a prescribed age They alone, and to the exclusion of the other sex, as determined by its highest court of law, could exercise the judicial function as existing and established by that instrument.

"By the act relating to the separation of the District of Maine from Massachusetts, the authority to determine upon the question of separation, and to elect delegates to meet and form a constitution, was conferred upon the "inhabitants of the several towns, districts and plantations in the District of Maine, qualified to vote for governor or senators," thus excluding the female sex from all participation in the formation of the constitution, and in the organization of the government under it. Whether the constitution should or should not be adopted, was specially, by the organic law of its existence, submitted to the vote of male inhabitants of the state.

"It thus appears that the constitution of the state was the work of its male citizens. It was ordained, established, and ratified by them, and by them alone. But by the power of government was divided into three distinct departments: legislative, executive and judicial. By article 6th, section 4, justices of the peace are recognized as judicial officers.

"By the constitution, the whole political power of the state is vested in its male citizens. Whenever in any of its provisions, reference is made to sex, it is to duties to be done and performed by male members of the community. Nothing in the language of the constitution or in the debates of the convention by which it was formed, indicates any purpose whatever of any surrender of political power by those who had previously enjoyed it, or a transfer of the same to those who had never possessed it. Had any such design then existed, we cannot doubt that it would have been made manifest in fitting and appropriate language. But such intention is nowhere disclosed. Having regard then to the rules of the common law as to the rights of women, married and unmarried, as then existing—to the history of the past—to the universal and unbroken practical construction given to the constitution of this state and to that of the commonwealth of Massachusetts, upon which that of this state was modelled, we are led to the inevitable conclusion that it was never in the contemplation or intention of those forming our constitution that the offices thereby created should be filled by those who could take no part in its original formation, and to whom no political power was entrusted for the organization of the government then about to be established under its provisions, or for its continued existence and preservation when established.

"The same process of reasoning which would sanction the conferring judicial power on women under the constitution, would authorize the giving them executive power by making them sheriffs and major-generals.

"But while the offices created by the constitution are to be filled exclusively by the male members of the state, we have no doubt that the legislature may create new ministerial offices not enumerated therein, and if deemed expedient, may authorize the performance of the duties of the offices so created by persons of either sex."

CHICAGO LEGAL NEWS, JANUARY 2.

What Acts amount to a Declaration of Trust.—Adams v. Adams, Supreme Court of the United States, October Term, 1874. [7 Chi. Leg. News, 113.] In this case the Supreme Court, in an opinion by Mr. Justice Hunt, settles a valuable point having reference to the question, what acts amount to the declaration of a trust by a husband in favor of his wife. Adams signed and sealed a deed settling certain property upon a third person in trust for the benefit of his wife during her life. Together with his wife, he acknowledged its execution before two justices of the peace, and caused it to be recorded, but delivered neither to the trustee nor to his wife. His wife having afterwards been divorced from him, brings this suit in equity in the Supreme Court of the District of Columbia, to establish the trust and to enforce its provisions. In addition to the circumstances above stated, attending the execution and recording of the deed, it was in proof, without contradiction, that Adams had made frequent statements that he had settled the property in question upon his wife. Under this state of facts, the question was, whether the acts and declarations of Adams amounted to such a declaration of trust as a court of equity can recognize and enforce. This question the court resolve in the affirmative, after examining the following authorities: Cloud v. Calhoun, 10 Rich. Eq. 362; King v. Donnelly, 5 Paige, 43; Bunn v. Winthrop, 1 John. Ch. 329; Somerbye v. Arden, Ibid. 240; Reeves v. Scott, 9 Howard 196; S. C. 13 Ibid. 211; Lewin on Trusts, 4th ed. p. 55; Hill on Trusts, 136. In the course of the opinion, Mr. Justice Hunt says: "In the case before us the settlor contemplated no further act to give completion to the deed. It was not an intention simply to create a trust. He had done all that was needed. With his wife he signed and sealed the deed. With her he acknowledged it before the proper officers, and himself caused it to be recorded in the appropriate office. He retained it in his own possession, but where it was equally under her dominion. He declared openly and repeatedly to her, and to her brothers and sisters, that it was a completed provision for her, and that she was perfectly protected by it. He intended what he had done to be final and binding upon him. Using the name of his friend as trustee, he made the placing the deed upon record, and keeping the same under the control of his wife, as well as himself, a delivery to the trustee for the account of all concerned (Cloud v. Calhoun, 10 Rich. Eq. R. 362), or he intended to make himself a trustee by actions final and binding upon himself."

The trustee having refused to accept the trust, the learned justice, also says that this was not a controlling circumstance.

Trespass—Kick of Mare by Horse Through wire Fence—Whether Damage too Remote.—Ellis v. Loftus Iron Company, English Common Pleas, November 19. [7 Chi. Leg. News, 116.] In this case the plantiff's mare, and the defendants' horse (being a stallion), were separated by a wire fence, through which the horse of the defendants' bit, kicked and damaged the mare of the plaintiff. *Held*, first, that this was a trespass by the defendant; and secondly, that the damage to the plantiff's mare was not too remote, and a judgment of a county court judge, being to the contrary effect upon both points, reversed upon appeal.

The grounds on which the judgment is rested were best given by Lord Coleridge, Ch. J., who said:

"It has been decided over and over again that a trespass cannot be measured; whether it be an inch or an ell, it is a trespass all the same. Similarly it has been decided over and over again that it is a man's duty to keep his cattle in, and that if his cattle get upon another man's land, the owner is liable to that other in trespass, independent of negligence, great or small. The law is, that the man himself is liable in trespass if he go upon that which is his neighbor's; and that law equally applies to the case of cattle. In the present case it is found as a fact that there was a wire fence between the land of the plaintiff and the land of the defendants, and that the horse of the defendants kicked and bit the mare of the plaintiff through that fence—which could not have happened, unless some portion of the horse of the defendants had been protruding over the land of the plaintiff. There was, therefore, evidence of a trespass. As to the second point, the damage was remote, no doubt, but it was not too remote in law. It was a naturul consequence of the trespass, within the rule laid down in Vickers v. Wilcocks (*ubi sup*). I have said enough to dispose of the case, but I will add that I do not think the merits of it are opposed to the law."

Negligence—Duty of a Warehouseman to Provide Post for Hitching Teams, or Guards to Prevent Teams from Backing into the River.—Buckingham v. Fisher, Supreme Court of Illinois, Sept. 24, 1874, opinion by Walker, J. [7 Chi. Leg. News, 115.] The defendants, when this suit was brought, held a lease from the Illinois Central Railway Company, of a warehouse, and the ground upon which the house was erected. They were using it for the storage of grain, consigned to them and other persons in the city. The railway company discharged the grain it transferred from the country to the city, into this warehouse.

It was located on the bank of the Chicago river, on the margin of which there was a dock, at which lake vessels landed and received cargoes of grain from the warehouse, for shipment to the Eastern markets. There was an open space between the warehouse and the dock over which teams passed to receive grain stored in the ware-house, for delivery in the city. Such teams passed over the narrow space left for the purpose on the west, between the warehouse and the river or dock line, and turned on a space about forty feet square at the north end of the building. After turning, teams were driven near to the door of defendants' office, where the driver, on presenting his order, received from the clerk a ticket for a wagon-load of grain, when he again drove on the narrow strip to the west of the warehouse and received his load of grain. Teamsters going there for grain, had, therefore, to leave their teams whilst they went into the office to procure tickets, as they were only delivered to teamsters when their wagons were at the warehouse to receive grain. Whether places for hitching teams, whilst drivers were in the office procuring tickets, were provided, seems to be involved in doubt, as the evidence on that point is very conflicting.

The plaintiff having purchased some grain in the warehouse in the latter part of April or first of May, 1871, sent his team to remove it. And whilst the driver was in the office, according to the rules adopted by the defendants, to receive a ticket for a load of grain, his horses, which had been hitched to a clog

weighing twenty-two pounds, commenced backing, and before the driver could reach them they backed over the edge of the wharf into the river and were drowned, and the wagon and harness were lost. The evidence shows there was no fender or guard of any kind on the edge of the wharf to prevent the wheels of the wagon from running off and into the river. This action was brought to recover for the loss of team, wagon and harness, upon the hypothesis that it was the duty of the defendants to place guards or fenders on the edge of the wharf as a protection to teamsters from accident, and for the alleged negligence in not providing proper facilities for hitching teams going there for grain.

Upon these facts it was held that the defendants owed no duty to the public or to the plaintiff to erect hitching posts, or to place fenders so as to prevent teams from backing into the river, and that the defendants' servant was probably guilty of contributory negligence in winding his lines around the hub of his wagon. But this last point was a mere conjecture; there seems to have been no proof that the lines were wound around the hub of the wagon.

Legal News and Notes.

—THE Luzerne Legal Register names a list of its legal exchanges, and commends them to its readers, and then naively adds: "We understand that there are other legal papers published in the country, such as the Albany Law Journal, American Law Review, Law Times, Bench and Bar, American Law Record, &c., but we know nothing of them, as they have never deemed our publication worthy of an exchange, and we apprehend that our exchanges mentioned above are about the only legal periodicals we can commend to our readers as well worthy their patronage."

—THE GREAT SEAL OF ENGLAND.—The "Porter to the Great Seal" informs the Legal Departments Commissioners that the quantity of wax used is about 4 cwt. per month. The porter says he has charge of the Great Seal during the day, and delivers it up to the lord chancellor the last thing at night. The porter is in attendance for nine hours a day, and longer at times in the parliamentary session, as he has to remain at the house of lords until that house is up, and then to go to the lord chancellor's house after him with the Great Seal. The porter adds that he never had more than a week's holiday in a year.

—TWEED still beats at the bars of his jail. He yearns for freedom. His lawyers have prepared a return to the *certiorari*. It is an interesting, if perhaps a technical, pleading. But it omits one point—namely, the proffer to the treasury of all the money stolen from the city during his tenure of power. This would be a brave act. It would show that the old man really wanted to get out of jail. It would be an act of justice properly preceding an act of mercy. What eloquent speeches David Dudley Field and Judge Comstock could make on this offer! Let us have justice before mercy. Pay back the money!—[*New York Herald.*

—WHATEVER may have been the actual result of the recent election in Louisiana, it is conceded by both parties that the five constitutional amendments proposed by Kellogg and adopted by the legislature, were ratified by the people. The first, indorsing the funding bill and the bonds issued under it, has a majority of 9349; the second, reducing and limiting the state debt to $15,000,000, and limiting taxation, has a majority of 11,190; for the third, devoting the yearly state revenues to the expenses of the same year and prohibiting the issue of warrants in excess of revenues, the majority is 10,504; for the fourth, limiting the debt of New Orleans and prohibiting its future increase, 9,755; for the fifth, making the state election fall on the same day of the year as the presidential, 7,706.

—AN ELECTION BLUNDER.—In Sullivan county, New York, at the late election, nearly four thousand votes were cast for Judge Miller, the democratic candidate for the court of appeals, with the indorsement "For Judge of the Court of Appeals." The constitutional title of the office is "Associate Judge of the Court of Appeals," and the defective votes were rejected by the state canvassers, on the ground that "no such office as Judge of the Court of Appeals is known to the constitution." The error did not affect the result, Judge Miller's plurality over his competitor, Judge Johnson, being nearly forty-six thousand, without the defective votes. The members of the board of canvassers who rejected these votes because of a clerical mistake like this—one which could not possibly be misunderstood—published themselves either as rogues or fools. There is altogether too much of such nonsense in the conduct of judges of elections and canvassing boards. If a judge on the bench should be guilty of it, his conduct would meet with universal reprobation.

—A HISTORICAL PRECEDENT.—A correspondent of the St. Louis Republican, who signs himself "T," writes as follows:

In looking over an old common-place book, I find the following extract which seems appropos to the present discussion between two reverend gentlemen of the Episcopal church:

The lord high chancellor in a decision relating to some ecclesiastical matter, gave expression to the following:

"There is not found in the creed of the church such a distinct declaration upon the mysterious question of the eternity of final punishment, as to condemn the expression of hope by a clergyman that the wicked will eventually be saved. I, therefore, dismiss the case and order the appellants to be taxed with costs."

Whereupon some wits of the bar got off the following prospective epitaph;

Richard Baron Westbrook, Lord High Chancellor of England. He was an eminent Christian, an energetic statesman, and still more eminent and successful judge. During the three years' term of his office he abolished the time-honored institution of the insolvent court, the ancient mode of conveying land, and the eternity of punishment. Towards the close of his earthly career, in the judicial committee of the privy council, he dismissed hell with costs, and took away from orthodox members of the Church of England their last hope of eternal damnation.

I omitted copying the date of the above, but that can be ascertained by finding the period of Lord Westbrook's chancellorship.

—THE Financial and Commercial Chronicle, a very ably conducted journal, thus comments on the recent decision of the New York Court of Appeals in regard to the certification of checks: A moment's reflection will convince every one that much further than this the bank ought not to go. The holder brings the check to it to obtain such knowledge as it has; the bank on which the check is drawn cannot have followed the check since its issue, nor can it give any information with regard to its history. The filling up is no more within the knowledge of the bank than within the knowledge of the holder. To guarantee, then, the genuineness of the check in all respects, would require a complete change of business on the part of the bank, an extent of research and investigation not consistent with its other duties.

This rule, however, does not extend to the signature to the check. So far as that is concerned, the bank is supposed to have knowledge and its certificate covers it. In fact, this position is justified on the same grounds which relieve the banks of responsibility in the other case. When one presents a check for certification, the holder is supposed to come for information on points which are peculiarly within the bank's knowledge, and the bank is ready, to just that extent, to impart information. It knows its own depositors' signatures, and it knows whether there are any funds to his credit, and how much. Hence, when it certifies the check is good, it says in substance that the signature is correct, and that the drawer has the necessary funds; and further, that it will keep those funds to pay that check, provided the check is found to be in every other particular genuine. The principle than settled by this decision is simply this, that for matters not especially within its knowledge, the certifying bank is not liable.

—AT a banquet recently given to the judges by the Lord Mayor of Dublin, in response to a toast of the Lord Mayor, "The Bench of Ireland," the Lord Chief Justice of Ireland, referring to the ridicule which laymen frequently cast upon the legal profession for their strict adherence to precedents, used the following eloquent language:

"It was said of the judges of the present day that they slavishly followed in the steps of their predecessors; and why not? Were they to reject the accumulated treasures reserved for them in the judgments of the great men who had lived before them? Were they to reject the matchless expositions of the law by Mansfield? Were they to neglect the bright example of Holt, or the deep learning of Hay? No, it should be their pride in humility to study, to understand, to apply, the everlasting principles of justice which these great judges taught. It was said by some that the images of men's wits were preserved in books, and so were capable of perpetual renovation. Others said, and truly said, that while the piece dropped and the picture faded, the ideas of the great and good were indistructible, and should more properly be compared to seeds which, cast in the minds of other men, perfect infinite thought and action through succeeding ages. They had the ideas of the great and good of all time before them; they had it in the long and illustrious line of the magistrates who had preceded them in the administration of justice. It was not caprice, it was not fancy or folly, it was their duty to preserve, maintain and consolidate the maxims of justice, equity and knowledge which they in their illustrious careers practiced and enforced. Look back through the history of the world! Is there any country in which there was civilization and freedom where the profession of the law had not been honored? and of the English nation they found that in all ages it has been upheld, honored and respected, and, as Lord Coke said, it had founded a greater number of noble families than any other profession in the land; and why? Because as a nation they loved justice."